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REPORTS OF CASES

James ...

IN THE

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SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1912—JANUARY TERM, 1913.

VOLUME XCII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART

DEPUTY REPORTER.

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BY HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT,

For the benefit of the State of Nebraska.

JUN 12 1913

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

MANOAH B. REESE, CHIEF JUSTICE.
JOHN B. BARNES, ASSOCIATE JUSTICE.
CHARLES B. LETTON, ASSOCIATE JUSTICE.
WILLIAM B. ROSE, ASSOCIATE JUSTICE.
JACOB FAWCETT, ASSOCIATE JUSTICE.
SAMUEL H. SEDGWICK, ASSOCIATE JUSTICE.
FRANCIS G. HAMER, ASSOCIATE JUSTICE.

OFFICERS.

GRANT G. MARTIN... Attorney General
GEORGE W. AYRES... Deputy Attorney General
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HARRY C. LINDSAY... Reporter and Clerk
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VICTOR SEYMOUR... Deputy Clerk

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Third.....	Lancaster.....	Albert J. Cornish P. James Cosgrave... Willard E. Stewart...	Lincoln. Lincoln. Lincoln.
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Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran.. Edward E. Good....	York. Wahoo.
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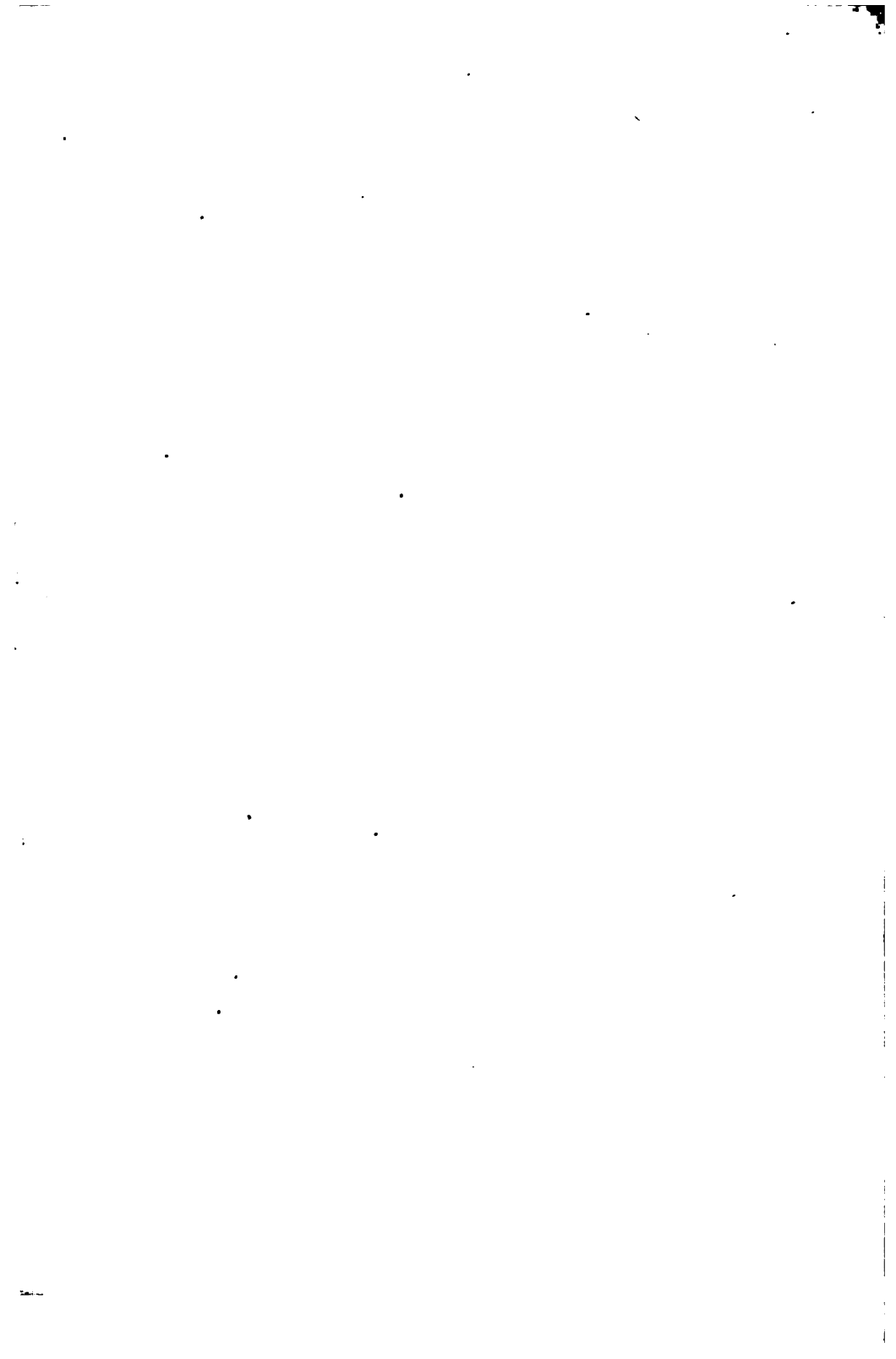
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In Memoriam.

ELISHA C. CALKINS.

At the session of the supreme court of the state of Nebraska, October 23, 1912, there being present Honorable MANOAH B. REESE, Chief Justice, Honorable JOHN B. BARNES, Honorable CHARLES B. LETTON, Honorable WILLIAM B. ROSE, Honorable JACOB FAWCETT, Honorable SAMUEL H. SEDGWICK, and Honorable FRANCIS G. HAMER, Associate Justices, the following proceedings were had:

MAY IT PLEASE THE COURT:

The committee appointed by your Honors to prepare and report a memorial and resolutions concerning the recent death of the Honorable ELISHA C. CALKINS, respectfully submit the following:

On the eighth day of July, 1912, the Supreme Ruler, in His wisdom, removed from earthly scenes ELISHA C. CALKINS, a veteran of the Civil war, an honored member of this bar, and formerly a Supreme Court Commissioner.

Judge CALKINS was an accomplished scholar, a learned jurist, and beyond all a man of absolute integrity. The opinions written by Judge CALKINS, while an assistant of this court, are convincing evidence of his great learning, searching analysis, and masterful composition.

Judge CALKINS attained his high estate unaided by inherited wealth, or kindly circumstances, and after he had served his country one year as a soldier in the ranks. During all the years of his laborious advance his character remained unsullied.

Although not an office seeker, Judge CALKINS responded to the civic call to duty, as in early manhood he answered his country's call to arms, and, in the many places of trust and honor he was called upon to fill, more than fulfilled his most sanguine friends' just expectations: Therefore,

Be it Resolved. That the members of this court, in common with the people, and the bar of this state, deeply regret the death of the Hon-

viii IN MEMORIAM—ELISHA C. CALKINS.

orable ELISHA C. CALKINS; that we will ever hold in reverential remembrance his wonderful attainments, his magnificent character and his patriotic record;

Be it Resolved, That he honored the state of his adoption, and the bar of which he was a most distinguished member; that he leaves to his family a priceless heritage, and that his career will be an inspiration for years to come;

Resolved, That these resolutions be spread upon the records of this court, and that a copy be sent to the family of the deceased.

WARREN PRATT.

NORRIS BROWN.

FRANK M. HALL.

JESSE L. ROOT.

THOMAS F. HAMER.

BY THE COURT:

It is ordered that the resolutions adopted by the committee be spread upon the records of this court, and that they be published in the next volume of the reports.

M. B. REESE,

Chief Justice.

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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
SEPTEMBER TERM, 1912.

**AMERICAN SURETY COMPANY, APPELLANT, v. DUNCAN M.
VINSONHALER, APPELLEE.**

FILED SEPTEMBER 28, 1912. No. 16,771.

- 1. Principal and Surety: ACTION AGAINST PRINCIPAL: PETITION: SUFFICIENCY.** The defendant held the office of county judge for three successive terms; the plaintiff was surety on his official bonds. The agreement between them was that the defendant should indemnify the county and save it harmless from all claims, etc., arising out of the suretyship, and should place the surety in funds to meet any claim, etc., "before it shall be required to pay the same." The defendant, as principal, and the plaintiff, as surety, were sued by the county for the alleged unlawful detention of fees by the defendant; it was found that the county had no cause of action and the suit was dismissed. Afterwards the plaintiff began this action to recover from defendant expenses incurred by plaintiff for attorney's fees and other expenses in defending the original suit. It appeared from the petition that the defendant herein employed counsel and defended the original suit, and it was not alleged that this defendant had failed to indemnify the plaintiff, and place the plaintiff in funds to meet all claims arising out of the suretyship as agreed, or that there was any real or apparent necessity of incurring the expenses sued for, or that the surety had any reason to, or did, consider that such expenses were necessary for its protection. *Held*, That the petition failed to state a cause of action, and that a general demurrer thereto was rightly sustained.
- 2. ———: LIABILITY OF PRINCIPAL.** Also, *held*, that the surety under the alleged contract was entitled to be protected against all necessary expenses incurred in defending itself against liability on these bonds, and should be allowed to exercise a reasonable discretion as to necessary measures of defense.

American Surety Co. v. Vinsonhaler.

3. ———: ———. Also, that when the petition itself indicates that the expenses sued for were unnecessary, and no circumstances are alleged showing any necessity therefor, or that the surety had any reason to, or did, regard such expenses necessary, there can be no recovery.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Montgomery & Hall, for appellant.

Gurley & Woodrough, *contra.*

SEDGWICK, J.

This defendant was county judge of Douglas county for three several terms, and the plaintiff was surety upon his official bond for each of the terms. After the end of the third term the county began an action against the defendant and against this plaintiff as his surety, upon the three official bonds, to recover several thousand dollars for fees of the office which it was claimed had been received by the defendant and not accounted for. It was finally determined in that action that the defendant was not liable to the county, and the action was dismissed; and the plaintiff brought this action to recover its attorney's fees and other expenses incurred in the former action. A general demurrer to the amended petition was sustained and the action dismissed, and the plaintiff has appealed.

The amended petition, after alleging the above facts and the usual formal matters, alleged that the defendant made application to the plaintiff in writing, requesting the plaintiff to become surety upon his official bonds in the sum of \$50,000, and, as a part of his said application, agreed in writing with the plaintiff as follows: "That I will, at all times, indemnify and save the surety harmless from and against every claim, demand, liability, cost, charge, expense, suit, order, judgment and adjudication whatsoever, and will place the surety in funds to meet every claim, demand, liability, cost, charge, expense, suit.

order, judgment or adjudication against it by reason of such suretyship and before it shall be required to pay the same."

The bonds executed by the plaintiff are alleged in the petition to have contained the following: "Now the condition of the above obligation is such, that if the above bounden Duncan M. Vinsonhaler shall faithfully and impartially perform and discharge the duties of said office according to law and shall promptly account for and pay over all money, papers, or other property that may come into his hands in virtue of his said office, to his successor in office, or to the person or party entitled thereto, then this obligation to be void, otherwise to be and remain in full force and virtue."

The several applications do not appear to have been worded precisely the same, and it is alleged that the third application contained the following agreement on the part of this defendant: "And I do further hereby bind myself, my heirs, executors and administrators, to save the said surety company harmless, and on demand to pay it any and all claims, demands, loss and damages of every nature and kind and on demand to pay it all legal and other costs, counsel fees, and expenses directly or indirectly which said surety company shall at any time sustain by reason or in consequence of such suretyship, and any and all renewals, extensions and continuations thereof, whether before or after legal proceedings by or against said surety company, and without notice thereof to me."

It is alleged that the action begun by the county was jointly against the principal and surety, and that after the principal had answered the surety answered separately, and "employed attorneys to represent, look after and so act as might be deemed necessary to protect the the interests of this plaintiff as defendant in said action." It appears from the petition that this defendant also answered and defended the original action. There is no allegation in the petition that the defendant failed or neglected to indemnify the surety and protect it against

the claim of the county, or to "place the surety in funds to meet every claim or demand" that might be made against it by reason of its suretyship, or that the defendant in any other way failed to perform his agreement with this plaintiff, or that the defendant failed in any respect to properly and fully defend the original action against him and the surety.

The plaintiff insists that by the terms of the contract between the parties it was left to the discretion of the surety to employ attorneys if it saw fit to do so, and that unless the defendant showed that the plaintiff acted in bad faith, so that its action would amount to a fraud upon the defendant, the fees so paid to attorneys constitute a proper charge against the defendant. To support its position the plaintiff relies upon the decision of the supreme court of Iowa in *United States Fidelity & Guaranty Co. v. Hittle*, 121 Ia. 352. Without determining whether we would be willing to follow that court to the full extent of its opinion in that case, we are satisfied that the language there used should not be applied in a case of this kind. In that case, it does not appear that the principal upon the bond agreed to place funds in the hands of the surety sufficient to protect it against any claim or demand, and we cannot believe that that court would hold that in such case, if the defendant complied with that agreement, and while there were funds in the hands of the surety, furnishing protection against the claim that was being urged against the principal, and while the principal was properly and sufficiently defending the action, the surety could, without the knowledge or consent of the principal, incur additional and apparently unnecessary expense, and recover the same from the principal. The case at bar is more clearly analogous to *American Surety Co. v. Lehr*, 93 S. W. (Tex. Civ. App.) 681. In that case, the agreement between the principal and the surety also contained the agreement on the part of the principal to place the surety in funds to meet every claim and demand, and the opinion in the case shows that this was done by the prin-

cipal. Their contract also provided that in case the principal requested the surety to defend the action he would defray any cost, charges and expenses which it might incur in so doing. While the surety held these funds for indemnity, and, without any request to do so from the principal, it employed counsel to defend the action brought against the principal and surety upon the bond. That court held that under these circumstances the surety, which was fully indemnified by the deposit of collaterals, could not defend the action at the expense of the principal without the principal's request so to do. In the case at bar, we have very much the same conditions. The petition shows that the agreement was that the principal should furnish funds to the surety sufficient to indemnify it against any claim, and, in the absence of any allegation that he failed to do so, or failed to properly defend the suit, it must be considered, as against the pleader, that the principal had complied with all of his agreements in that regard. If the surety was fully protected by the principal against any possible judgment that might be obtained by the county in its action, and the principal had employed attorneys who were fully and properly defending the action, further expense on the part of the surety must have been unnecessary and wanton. No doubt under this contract the surety ought to be protected against all necessary expenses incurred in defending itself against liability on these bonds, and should be allowed to exercise a reasonable discretion as to necessary measures of defense, but the allegations of this petition indicate that the expenses sued for were unnecessary, and there is no allegation of circumstances showing any necessity for such expense, or even that the surety regarded such expense necessary. In these respects the petition failed to state a cause of action and the demurrer was properly sustained.

The judgment of the district court is therefore

AFFIRMED.

JOHN GASTER ET AL., APPELLEES, V. ESTATE OF FREDERICK
GASTER, APPELLANT.

FILED SEPTEMBER 28, 1912. No. 17,057.

1. **Statutes: INHERITANCE LAW: CONSTITUTIONALITY.** Chapter 49, laws 1907, does not violate the provision of section 11, art. III of the constitution, that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title."
2. **Wills: RIGHTS OF SURVIVING SPOUSE.** A husband cannot lawfully devise his real estate or lawfully dispose of his personal property by will so as to deprive his wife of all interest therein given by the said act.
3. ———: ———. If a married man by his will disposes of all his property, real and personal, to others, and gives nothing to his wife, she will be entitled to take the distributive share given her by the statute as though he had died intestate.

OPINION on motion for rehearing of case reported in 90 Neb. 529. *Rehearing denied.*

SEDGWICK, J.

The first opinion in this case, 90 Neb. 529, considered principally the alleged antenuptial agreement. The right of election under section 7 of the statute, commonly known as "King's Inheritance Act" (laws 1907, ch. 49), was also discussed. In that discussion the constitutionality of the act was assumed, and it was also assumed that under that act the widow inherited one-fourth of the property of the decedent, although he left a will disposing of all of his property and making no provision for her. The question as to the constitutionality and proper construction of the act was necessarily involved in the case. Upon the motion for rehearing the importance of this question was pointed out, and the motion was set down for argument and further consideration. In considering the difficult and somewhat complicated question so presented, we have had the assistance, not only of the able counsel employed in the case, but also several other eminent attorneys who have

appeared as friends of the court. The act is entitled: "An act to provide for succession to the estates of decedents and to repeal sections 4901, 4902, 4903, 4904, 4905, 4906, 4907, 4908, 4909, 4910, 4911, 4912, 4913, 4914, 4915, 4916, 4917, 4918, 4919, 4920, 4921, 4922, 4923, 4924, 4925, 4926, 4927, 4928, 4929, and 4930, and, also, sections 4940 and 5041 of Cobbey's Annotated Statutes of Nebraska of 1903 (C. S. ch. 23, secs. 1-30 inc., 40, 176)." Sections 4901 to 4928, inclusive, gave the widow dower in the lands of her deceased husband and were the general provisions of our statute relating thereto. Section 4929 provided for the descent of estates of married women. Section 4930 provided for the descent of real estate when not lawfully devised. Section 4940 provided that nothing in the chapter should affect curtesy or dower or any limitation of any estate by deed or will. Section 5041 provided for the descent of personal property not disposed of by will. Apparently the legislature attempted to give the wife a share in the estate of her deceased husband in lieu of dower. The statute is said to be unconstitutional because it legislates upon more than one distinct subject, and because the subject or subjects of legislation are not clearly expressed in its title, and so violates section 11, art. III of the constitution.

The act is very vigorously assailed upon general principles. It is said that, whereas the tendency of legislation in this state has continually been to enlarge the rights of married women, and it is to be presumed that the legislature attempted to do so in this act, still the effect of it is to rob them of valuable rights that they already enjoyed, and to give them nothing substantial in lieu thereof. Section 1 of the act, which attempts to give the wife a share in the real estate of her deceased husband, describes it as real estate "which has not been lawfully devised;" and section 3 of the act, which relates to personal property, gives her a share in personal property "not lawfully disposed of by his last will." And so, if this language is literally construed, the husband may dispose of all his property, real

Gaster v. Estate of Gaster.

and personal, except the homestead, without the consent or even the knowledge of his wife. By the terms of the act, whatever interest in the real estate of her husband the wife takes is subject to his debts, and, dower being abolished, the wife may thus be deprived of all interest in his real estate, except her homestead right. It is also said that section 7 of the act gives the wife a right of election when her husband has provided for her in his will; but when he has devised his property to others she has no election, but is deprived of all interests therein; she is left no election to take her dower free from the claims of creditors in lieu of her rights under this statute, and so what the creditors leave, if anything, her husband may deprive her of by his will.

The objections to the constitutionality of the act are quite serious. It is said that the word "succession" in the title, "An Act to provide for succession to the estates of decedents," has a well-defined and technical meaning; that it denotes the "coming in of another to take the property of one who dies without disposing of it by will." This seems to be its meaning in the civil law and in those jurisdictions which have adopted that procedure. The term is expressly so defined in the statutes of some of the states. *Estate of Headen*, 52 Cal. 294. It has not been so defined in this state, and neither by statute nor judicial construction has it received any technical meaning. In Webster's New International Dictionary we find the following definition: "The change in legal relations by which one person (called the *successor*) comes into the enjoyment of, or becomes responsible for, one or more of the rights or liabilities of another person (called the *predecessor*), * * * when it is to a right to be enjoyed, as property, it is called active." We think that the title to this act might suggest to the legislators and others interested a subject of legislation as broad as that indicated by this definition, particularly when as a part of this title specific sections of the statute are named relating to the subjects legislated upon. The title specifies various sections of the statute

relating to dower, with the statement that they are to be repealed by the act, which is accordingly done, and so, also, the section which provides for the descent of the estates of married women together with the sections which provide for the descent of property both real and personal. Prior to the enactment of this statute, section 4940 provided that nothing in the decedent law should affect estates by curtesy or dower, and this section is also named in the title of the act. We think therefore that by this title the attention of the legislators and others interested must have been called to the purpose and scope of this legislation.

We do not feel justified in holding the act unconstitutional as legislating upon more than one distinct subject. Its subject of legislation is the passing of property from the dead to the living, and would include either the title to property or the possession, or both. The act purports to be complete in itself. Having this broad general title, it may incidentally affect some matters that might be connected with other legislation and not for that reason be invalid. The general statute upon the subject of wills provides: "Every person of full age and sound mind, being seized in his own right of any lands, or any right thereto, or entitled to any interest therein descendable to his heirs, may devise and dispose of the same by his last will and testament, in writing." Comp. St. 1911, ch. 23, sec. 123. By the statute on the subject of dower, as it existed before the enactment of the law in question, the husband's right to devise his real estate was limited, and by the homestead act the widow could not be deprived of her right of homestead by will. Neither the dower nor the homestead statute referred to the statute of wills, and yet their validity was never questioned for that reason.

The first, and perhaps one of the most prominent, difficulties in the construction of this act is that, in defining the rights of the husband or wife in the property of the deceased spouse, the statute contains the expression, "not lawfully devised," in the case of real estate, and "not law-

fully disposed of by will," in the case of personal property. Section 7 of the act undertakes to give the widow the right of election, but gives her such right only in case provision is made for her in the will; so that, if these provisions are taken literally, she has the right of election if she is remembered in the will; but, if nothing is given her in the will, she has no right of election nor any other right in the property of the husband other than the homestead.

The duty devolved upon this court to construe and enforce the limitations which the constitution has placed upon the several departments of the state government is a very important and delicate duty. All presumptions are in favor of the validity of acts of the legislature. The construction which that branch of the government placed upon the constitutional limitations of its own powers must be considered, and no act of the legislature will be held to violate the constitution unless such conclusion is unavoidable. The presumption that the legislature intended to regard constitutional limitations is so strong as to control the meaning of the language used in all doubtful cases. Every act will be so construed, if reasonably possible, as to harmonize it with the fundamental law. No duty of this court is more manifest and exacting than the duty to avoid trespassing upon the province of the legislature. The tendency of the courts in recent years has steadily been towards a more liberal construction of legislative enactments in this regard. It is not for this court to determine the legislative policy, nor to criticize that policy when adopted by the lawmakers. If apparently matters have been omitted in legislation which would have been supplied if brought to the attention of the lawmakers, it is not within the province of the court to supply such omissions. Hasty and ill-considered legislation can be revised only by the legislature itself. The difficulties presented in this legislation may suggest remedies which the contemplated revision of the statutes will supply.

In this case the deceased devised all of his property, but

made no provision for his widow: She insists that she ought to share in the property as though there were no will. The statute says that, when the real estate is not lawfully devised, she may do so. We are asked to hold that the property was lawfully devised, and that therefore the provision of the statute giving her a distributive share in the property has no application. Did the legislature intend such a result? Under the former statute she had her well-defined right of dower that neither the other heirs, nor the creditors of her husband, nor the will of the husband himself, could take from her. By the divorce law (Comp. St. 1905, ch. 25, sec. 23), also, the right of dower was secured to her if she obtained a divorce for certain causes. This section was amended in a special act of the same legislature. Laws 1907, ch. 50. The amended section leaves it to the discretion of the court to award to the innocent party a share or interest in the real estate of the guilty party. It would seem that if it was intended to subject her right to a distributive share of the property, which this new statute gives her, to the claims of the creditors, and to the will of her husband, the right of dower would have been preserved so that she might elect that right in case it was more valuable to her than such precarious provisions as this statute makes for her. Section 7 of the act gives her the right to elect between the provision made for her by the statute itself and the provision of the will. Did the legislature intend that when she was provided for in the will she might enjoy this right of election, but if she was given nothing in the will she should have no right at all? Language of a statute, not used in a technical sense, will be given its ordinary meaning, and every word used will be given its proper force and effect, if possible; but words that are inconsistent with the statute as a whole, so that their literal sense could not possibly have been intended by the legislature, will be disregarded or so construed, if possible, as to give effect to the will of the lawmakers. We find but one way to reconcile these provisions of the statute and sustain them.

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If the property which by this statute is given to the surviving spouse cannot be lawfully devised to others, the principal difficulty in construing the statute disappears. A statute of Wisconsin presented a similar difficulty. It implied the ability of the husband to lawfully devise the homestead. If not lawfully devised the homestead went to the widow. And this statute, like section 7 of our act, gave her the right of election if provision was made for her in the will. Referring to this apparent anomaly in the law, the supreme court of that state said: "What would be her rights in that regard where no provision is made for her in such will, may be difficult to tell. Whether, in such case, further legislation is necessary in order to properly protect the wife and widow is a matter addressed to the wisdom of another department of the state government." *Albright v. Albright*, 70 Wis. 528. In a later case that court said: "In *Albright v. Albright*, 70 Wis. 528, attention was called to the difficulty felt to exist, and, as it is not necessary now to decide the question, we mention it again, so that the legislature in its wisdom may settle the uncertainty in accordance with the wise and liberal policy of our laws in favor of the wife." *Church v. McLaren*, 85 Wis. 122. The Wisconsin court did not find it necessary to determine the proper meaning of the statute in either of these cases.

The supreme court of Ohio appears to have definitely construed a similar statute. Their statute provides that, if the husband dies "intestate" and leaves children, the widow shall be entitled to a specified share of the personal property. In *Doyle v. Doyle*, 50 Ohio St. 330, the husband died leaving a will whereby he disposed of all of his property to his children and others, "making no provision whatever for his wife," thus presenting the same question we have here. The supreme court of that state held that the wife was entitled to her distributive share of the estate. That court stated the question as we now have it before us, in these words: "Noting the fact that section 4176, giving her this portion of her husband's estate, is limited

to where he dies 'intestate' leaving children, and that sections 5963 and 5964 of the chapter relating to wills apply in terms only to where provision is made for her in the will of her deceased husband, they claim, that as he did not die 'intestate' and made no provision for her in his will, she is within the provisions of neither of these sections, and is, therefore, entitled to no part of his personalty subject to distribution, since, in the exercise of the power given him by statute to make a will, he has bequeathed it all to his children." The court then said: "We do not accept this construction. A careful consideration of the language of these sections shows, as we think, a clear recognition of the right of a widow to a portion of the personalty of her deceased husband, on distribution, that is beyond his power to affect by any will he may make, unless she assent to it. And this is in accordance, not only with the general understanding on the subject, but, also, with the liberal policy that has always prevailed in our law toward the widow. * * * Where he makes a will containing a provision for his wife, she is not compelled to accept the provision so made, but may renounce it and take under the provisions of section 4176, as if her husband had died intestate. But where provision is made for her in the will of her deceased husband, the statute requires that she shall be cited by the probate court to *elect*. * * * Why cite her to make an election, if she has not a right at law which she may retain if she chooses? No election can be made by any one between something and nothing. There is no alternative. The term necessarily connotes at least two things between which a choice can be made." The circuit court afterwards followed this construction of the statute and stated the law to be: "When the wife dies leaving a will in which no provision is made for her surviving husband, her estate will be treated (as) to him as if she had died intestate within the meaning of secs. 4176 and 5963, Rev. St." *Coon v. De Moore*, 25 Ohio C. C. Rep. 776. See, also, *Cummings' Ex'r v. Daniel*, 9 Dana (Ky.) *361.

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No other view as to the legislative intention can be reconciled with the act as a whole and the general purpose and policy of its provisions. Section 5 of the act is as follows: "The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage, may be barred by a conveyance executed by such husband and wife while residents of this state, and, if either such husband or wife be not a resident of this state, by a deed of conveyance executed either by both of said parties or by the one seized at the time of such conveyance; and such right to inherit may also be barred by the sale of such real estate under execution or other judicial sale, during the lifetime of the owner of the title." It is wholly inconsistent with the idea that the right can be defeated by will. It recites the right of a married man or woman in the property of his or her spouse, provides in express terms how that right may be barred, and excludes the power to bar that right by will. If the husband in his will makes such provision for the wife as she will prefer to the property rights that the law gives her, she may elect to take by the will, but, if he fails to do so, she may insist upon her rights under the statute.

The motion for rehearing is

OVERRULED.

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FILED SEPTEMBER 28, 1912. No. 17,453.

1. **Rape: EVIDENCE.** A conviction for rape cannot be sustained upon the uncorroborated testimony of the complainant.
2. ———: **CORROBORATIVE EVIDENCE.** The testimony of the complainant as to the commission of the crime by the defendant may be corroborated by evidence of facts and circumstances showing a disposition on his part to commit the crime and an opportunity to do so.
3. ———: **WEIGHT OF EVIDENCE: QUESTION FOR JURY.** If the crime

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itself is established beyond question, and there are inconsistencies in the evidence of the defendant, as to material matters, from which it may reasonably be inferred that the testimony of the complaining witness implicating the defendant is substantially correct, it presents a case for the jury, under suitable instructions.

4. ———: INSTRUCTIONS: CORROBORATIVE EVIDENCE. It is the testimony of the prosecuting witness as to the guilt of the defendant that must be corroborated. When there is evidence tending to prove several distinct crimes, and the prosecution has elected upon which to proceed, a request to instruct the jury that defendant must be acquitted, "unless you find from the evidence, beyond a reasonable doubt, that the defendant committed the act so elected, and as to this act you cannot find the defendant guilty on the evidence of Mary Waddick alone, as to the act she must be corroborated by testimony other than her own," was properly refused, for, although this language might be considered a correct technical statement, still, in the connection asked, the language might probably be misleading to the jury.
5. **Criminal Law: INSTRUCTIONS: DISTINCT CRIMES: ELECTION.** When upon the trial there is evidence tending to prove several distinct crimes, and the prosecution has been required to elect upon which it will proceed, the court should so instruct the jury in the submission of the case. It is erroneous under such circumstances to instruct the jury: "You are instructed that if you should find from the evidence, beyond a reasonable doubt, that an act of sexual intercourse did take place between the defendant and said Mary Waddick, and that at the time of said intercourse the said Mary Waddick was under the age of 15 years, then you should find the defendant guilty as charged in the indictment."
6. **Rape: WITNESSES: EVIDENCE: ADMISSIBILITY.** In a prosecution for rape of a female child under 15 years of age, it is not a defense that others have also abused the child in the same manner; but when the fact that the prosecuting witness has given birth to a child is relied upon by the state as evidence, and in her testimony she has denied having had intercourse with any one other than the defendant, she may properly be cross-examined as to circumstances tending to show that another than the defendant is the father of her child.
7. **Criminal Law: TRIAL: IMPROPER ARGUMENT.** Arguments and insinuations to the jury, not based upon competent evidence, are improper, and, although not so wilful and prejudicial as to require a reversal of the judgment, are indicated in the opinion to be avoided at a future trial.

8. **Rape: SENTENCE.** The crime of rape upon a child under the age of consent is a serious one, and we cannot say that, if the defendant is guilty as charged, a sentence of seven years' imprisonment in the penitentiary is beyond the reasonable discretion of the trial court.

ERROR to the district court for Hall county: JAMES N. PAUL, JUDGE. *Reversed.*

Harrison & Prince, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

SEDGWICK, J.

The defendant, who is plaintiff in error here, was convicted in the district court for Hall county of the crime of statutory rape upon one Mary Waddick, then under 15 years of age. He alleges that the complaining witness is wholly uncorroborated; that the evidence is entirely insufficient to support the conviction; that by various erroneous rulings of the trial court he was prevented from having a fair trial; and that the prosecuting attorney was guilty of misconduct which tended to prejudice the jury against him. When the first complaint was filed against the defendant, it was charged that the crime was committed on the first day of May, 1911. In a second complaint it was alleged that it was committed on the first day of April, and in the indictment afterwards found by the grand jury it was charged that the crime was committed on the first day of May. This indictment was returned on the 15th day of November, 1911. The complaining witness gave birth to a fully developed child on the 24th day of November, 1911. The complaining witness testified that she went into defendant's store in the evening and asked to see a pair of roller skates; that the defendant, who was alone in the store at the time, showed her a pair of skates, and told her that the price was \$3.50; that she told him she couldn't buy them for she hadn't the money,

and that he then offered to give her the skates if she would sometimes run errands and otherwise accommodate him. She knew what he meant and at first refused, but afterwards consented. Thereupon the crime was committed in the back room of the defendant's store while she was sitting on the back part of an automobile. It was repeated in about a week later. She was a witness in the preliminary examination before the justice of the peace, and testified that this crime was first committed in the latter part of March and while she was sitting upon a sewing machine. The defendant was in Illinois from the 10th to the 25th of March. There was no sewing machine in his back room, but it appears that there was a dismantled automobile there during the month of March. It was shown by the evidence of experts that the average period of gestation is about 280 days, varying considerably, but seldom less than 260 days. If the first statement of the time of the crime was correct, it would allow about 240 days for this period. The evidence of other witnesses established the fact that, if this crime was committed by the defendant, it must have been in the first part of March, and, if so, the period of gestation was about 265 days. It does not appear that this girl had any satisfactory means of fixing in her own mind the precise time of the commission of the crime, and the discrepancies in her testimony in that regard are perhaps of little importance, except as showing that she was ready to swear positively to matters of which she had but little knowledge.

1. The principal question as to the sufficiency of the evidence to support the conviction depends upon the corroboration of her testimony. It has been uniformly held that in such prosecutions a conviction cannot be sustained upon the wholly unsupported testimony of the complaining witness. It was shown by a clerk of the defendant that early one morning in the fore part of March the prosecuting witness brought a pair of roller skates to the store, and that he was told by the defendant to oil them for her, which he did. There was, however, no dis-

pute in the evidence that she obtained a pair of skates from the defendant, and this circumstance merely corroborates that fact. It was also shown that the girl was several times at the store, but this was not denied by the defendant. He admits seeing her there at times, and admits that she obtained the skates from him.

The defendant was a witness in his own behalf, and denied emphatically and positively ever having had intercourse with her or having taken any liberties with the complaining witness. He testified that, when she said that she could not buy a pair of skates at \$3.50, he showed her a pair that had been hanging in the show window and offered to sell them to her for \$2; that she said she did not have that much money, but had some, and that she was working and would pay 75 cents on the skates and the remainder in a week or two. He agreed to that, and told her to get her 75 cents. This was in the afternoon, and a couple of hours later, in the evening, she returned, paid her 75 cents and took the skates. She brought them in the next morning and had them oiled, as the other witness testified. If the evidence of the complaining witness was corroborated, it is, so far as we can see, in the cross-examination of the defendant himself. He testified that the skates were procured from him on the 25th of March, after he returned from Illinois, and to substantiate this testimony he offered in evidence a slip of paper on which was written the name of the complaining witness, the charge of \$2 for the skates, and the credit of 75 cents, showing a balance due of \$1.25, and bearing the date of March 25, 1911. This memorandum he testified was made at the time, or soon after the transaction. He was not certain whether he or his clerk made it. If he falsely dated this memorandum for the purpose of deceiving the jury, it might discredit his testimony in other particulars. He also testified to selling the complaining witness a bicycle soon after the sale of the skates. He produced in evidence two sheets of paper, which he said were taken from his account book, upon which appeared an entry of

the sale of the bicycle for \$5, on the 16th day of June. In this transaction he said the girl's employer was in the store with her and paid the money for her. Afterwards the bicycle was returned as unsatisfactory, and the defendant returned \$4 of the money, one dollar apparently being retained for injury to, or use of, the wheel. During all of this time the \$1.25 balance for the skates had been unpaid, and was still unpaid at the time of the trial. The defendant forgot, as he says, that circumstance when he returned the \$4. Other circumstances disclosed in the cross-examination tend to show that he received no money for the skates and never expected any. In this respect the girl's story is corroborated. If he gave the skates to the girl and has failed to explain satisfactorily any motive for so doing, the jury might perhaps be justified in considering that the explanation of the complaining witness was more credible. There are other inconsistencies in the evidence of the defendant, and the whole matter must be determined by a jury. We cannot see that the court should have taken this case from them.

2. The complaining witness testified to a repetition of the crime on several different occasions. When this evidence was received the defendant's counsel asked the court to then instruct the jury that, "by the introduction of plaintiff's evidence, the state has elected to ask for a conviction upon the first act of intercourse alleged to have occurred about March 1st, or March 5th, or 6th, 1911, to wit, the first act of intercourse testified to by Mary Wad-dick," and the court answered that the question will stand open until the evidence is received. This ruling was objected to, but we think it was in the line of universal practice and was not objectionable. The defendant then asked the court "to at this time require the state to elect upon which of the alleged offenses he will ask for a conviction in this case as shown by the testimony." This request was also overruled. When the witness was excused from the witness-stand the defendant again moved the court to instruct the jury "that the state, by the introduction of its

evidence, has elected to ask for a conviction upon the first offense testified to by Mary Waddick." To this it appears that no objection was made, and there was no ruling thereon. When the evidence of the state was all in, the defendant made the following motion: "The defendant now asks that the state be required to elect on what alleged act of intercourse it will ask for a conviction, fixing the date of the same." The court sustained the motion in the following order: "Motion sustained, and the prosecuting attorney is now required to fix the time of the alleged offense on which he asks for a conviction in this case." The prosecuting attorney elected to ask for a conviction "on the first act of intercourse proven, to wit, on or about the 7th day of March."

The defendant duly requested the following instruction: "You are instructed that the prosecutor has elected the act which he claims to have taken place on or about the 7th day of March, A. D. 1911, as the one upon which he will depend for a conviction of the defendant, and you are further instructed that in your consideration of this case your verdict will be for the defendant, unless you find from the evidence, beyond a reasonable doubt, that the defendant committed the act so elected, and as to this act you cannot find the defendant guilty on the evidence of Mary Waddick alone, as to the act she must be corroborated by testimony other than her own." This instruction was refused by the court, and the defendant excepted. The eighteenth instruction given by the court on its own motion was as follows: "You are instructed that if you should find from the evidence, beyond a reasonable doubt, that an act of sexual intercourse did take place between the defendant and said Mary Waddick, and that at the time of said intercourse the said Mary Waddick was under the age of 15 years, then you should find the defendant guilty as charged in the indictment"—and the defendant excepted.

No other instruction was given to the jury by the court as to the election made by the prosecution. The order of

the court made at the close of the evidence requiring the prosecution to elect upon which crime, testified to by the complaining witness, it would rely for a conviction, was correct. The defendant was entitled to this protection. It is true that the time of the commission of the offense is immaterial, providing it is within the statute of limitations, but a defendant cannot be tried and convicted of more than one crime in the same trial, and, when several distinct crimes are testified to and circumstances surrounding each crime are in evidence so as to identify the several distinct offenses, the state is required to designate the crime for which it will ask a conviction. The attorney general admits that the order requiring the state to elect was proper and necessary in this case, but insists that those orders made by the court in the presence of the jury were sufficient, and that a formal instruction to the jury upon this point in submitting the case was unnecessary. No authorities are cited supporting this suggestion, and we are not aware of any. The jury may or may not heed the orders given to the prosecuting attorney in the progress of the trial. At the close of the evidence they were instructed by the court as to the matters to be determined by them and as to the law governing those matters. Erroneous rulings of law made at the trial are frequently corrected by the instructions, and the jury should be governed as to the law of the case by the instructions alone.

The instruction asked by the defendant was properly refused. That the prosecuting witness must be corroborated as to the particular act of which the defendant is found guilty may in one sense be technically correct, but, in the connection proposed to be given to the jury, might and probably would be misleading. The request, however, was a suggestion to the court of the necessity of an instruction upon this point, and the eighteenth instruction given by the court amounts to a direct refusal to so instruct, and would, if taken literally by the jury, be inconsistent with a proper instruction. We think, therefore,

the eighteenth instruction, under the conditions in this case, was prejudicially erroneous.

3. The complaining witness admitted that she had, sometime before the commission of this alleged offense, frequently after night been in the rooms of one Snyder, and that he had taken undue liberties with her; that the matter had become somewhat notorious and her brother had interfered to prevent her visiting Snyder's room. She was then asked if Snyder had ever had intercourse with her; to which she objected, and the objection was sustained on the ground that the evidence was incompetent and immaterial. She was under the age of consent, and if the defendant had had intercourse with her, as she testified, it was immaterial whether others had. In this case, however, it was in evidence that she had given birth to a child. The crime therefore had been committed, and the question was, who was guilty. She had already testified that no one but the defendant had ever so used her. If that testimony was true, it was important evidence in the case; in fact, conclusive against the defendant, and the defendant should have been allowed to cross-examine her in that regard.

4. After the prosecuting witness had testified that the defendant and no one else was guilty of the crime, she was asked by her attorney: "Did you ever tell your folks anything about this?" She answered: "No, sir." She was then asked: "Well, you did later on, didn't you?" and again, "What do you mean by that answer?" and she replied: "I didn't until about the middle of September." She was then asked: "And then to whom did you tell it?" This was objected to as an improper question. The objection was overruled, and she said: "I told it to my brother." She further testified that, when her condition became known, her mother and brother several times asked as to who was to blame, and that she finally told her brother and then her mother that it was this defendant. The prosecuting attorney in his address to the jury stated: "The parents of the little girl had to tease to get her to tell

who this man was." This was objected to, and it is now insisted that it constituted misconduct on the part of the prosecuting attorney. What she told her mother and brother several months after the transaction as to the guilt of the defendant was of course incompetent.

Again, it appears that the defendant's wife had died in Illinois and was buried on the 25th of September. In cross-examination the prosecuting attorney asked the defendant: "Have you ever been in Illinois since last March?" This was objected to, but the question was allowed, and he answered that he had not. This immaterial evidence was also made the basis of a remark to the jury in the argument of the prosecuting attorney, in which he attempted to infer that one who would not be present at his wife's funeral would be more likely to commit a crime such as that with which the defendant was charged. Without further discussion of this unpleasant matter, we take it for granted that this course of questioning and argument will not be repeated.

5. It is insisted that the sentence, seven years in the penitentiary, was excessive. The crime charged is a serious one. If the defendant is guilty, we cannot see that the court has abused its discretion in fixing the punishment.

For the errors indicated, the judgment of the district court is reversed and the cause remanded.

REVERSED.

ROSE, J., dissenting.

I do not think the rulings held to be erroneous influenced the jury in arriving at their verdict, nor that defendant was prejudiced thereby. In my judgment, the conviction should not be reversed for any reason stated in the opinion. I do not put upon the conduct of the county attorney the interpretation suggested in the opinion, and I think that the prosecution as a whole should be commended by an affirmance.

FRANK V. LARSON V. STATE OF NEBRASKA.

FILED SEPTEMBER 28, 1912. No. 17,490.

1. **Criminal Law: TRIAL: SANITY OF ACCUSED: QUESTION FOR JURY.** When the contested issue in a criminal case is as to the mental condition of the defendant as affecting his responsibility for his act, that issue is to be determined by the jury; it is not a question for the court.
2. ———: ———: ———: **NONEXPERT WITNESS.** One not an expert is not allowed to testify to his opinion of the sanity or insanity of the defendant without first showing such knowledge of the defendant as would enable him to form an opinion.
3. **Quaere.** Whether a physician and surgeon who has treated the defendant in his professional capacity on various occasions for several years, and has also seen and conversed with him occasionally unprofessionally, and who testifies that he can give his opinion as to defendant's sanity based solely upon his knowledge of him derived unprofessionally, can be allowed to state that opinion when objected to by defendant on the ground of privilege under the statute—*quaere*.
4. **Criminal Law: TRIAL: SANITY OF ACCUSED: EXPERT EVIDENCE.** If an expert witness fails to testify to the facts and conditions which he has observed upon which to form an opinion as to the sanity or insanity of the defendant, or that what he had observed was sufficient to enable him to form an expert opinion, it is erroneous to allow him to testify that he has not observed anything that led him to the conclusion that the defendant was insane.
5. ———: **WITNESSES: PRIVILEGED COMMUNICATIONS: WAIVER.** The defendant, without objection, answered questions of the prosecuting attorney upon cross-examination relating to treatment of defendant by his physician and the physician's opinion of his condition. *Held*, That by so doing he did not waive his privilege to object that the physician could not as a witness for the state testify to confidential communications between them.
6. ———: **TRIAL: ADMISSION OF WRITING: HARMLESS ERROR.** It is erroneous to allow a writing in evidence as the writing of the defendant without proof of his signature or otherwise identifying it as written or authorized by him. But, if the substance of the writing is testified to by defendant and otherwise clearly proved without conflict, the error is without prejudice.

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7. ———: ———: INSTRUCTIONS. An instruction that, if the state has failed to establish "each and every" of the material allegations beyond a reasonable doubt, the jury must acquit, is not prejudicially erroneous, because of the use of the words "each and every" instead of the word "any."

ERROR to the district court for Burt county: GEORGE A. DAY, JUDGE. *Reversed.*

J. A. Singhaus and Smyth, Smith & Schall, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, *contra.*

SEDGWICK, J.

In October, 1911, the defendant killed his brother, Charles Larson, by shooting him in the head. The defendant was convicted of murder in the first degree in the district court for Burt county and sentenced to imprisonment in the penitentiary for life. He has brought the case here for review upon petition in error.

There is no dispute as to the principal facts in the case. The question is as to the mental condition of the defendant and his responsibility for the act. The defendant is a small man, was in poor health and very hard of hearing, so that it was necessary to use an ear trumpet in ordinary conversation. For many months there had been criminal relations of intimacy between the defendant's brother, Charles, and the defendant's wife. The defendant had suspected these relations for some time, and had at various times questioned his wife closely in regard to the matter, but she had continually denied that there were any improper relations between them. About the first of October she confessed to her husband that his brother Charles had attempted to take undue liberties with her, but insisted that it had not gone to extreme criminal relations. She seems to have fully repented of her part in the transaction, and had fully resolved to do everything in her

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power to conciliate her husband and repair the injury she had done him. In explaining the conduct of Charles in answer to the defendant's questions, she was finally led to admit that the matter had gone much further than she had at first stated. She declared that she was unable to talk about it, and proposed to write the full statement of what had taken place, which she thereupon did, and gave it to her husband. This statement showed the criminal relations that had existed for some time, and the defendant insisted that they both must withdraw from the church of which they were members, and that they could not live together, and that she must leave their home. This she consented to do, and consented to do anything that her husband desired, but when she left her home, in pursuance of this arrangement, he followed her in the interest, as he said, of their children, and requested that she return. at least for the present, until suitable arrangements could be made. She thereupon returned. There was also evidence that the defendant was very much attached to his wife and children (there were six children, ranging from two to fourteen years of age); and that, when he became aware of the full enormity of his brother's conduct, he was entirely overcome and was wholly undecided what to do; that at times he contemplated taking his own life, and that he had taken his gun from the house to the shed, mentioned below, for that purpose, and was then only deterred from taking his life by his young son who found him and urged him to return to the house; that at other times he contemplated driving his wife from their home, and was partly impressed with the idea that his brother would be compelled to leave the country, and that some suitable arrangements could be made for the future care of the children.

If the defendant is found guilty, a very important question is presented as to the degree of his guilt. If he was in a state of mind to be responsible for his conduct and planned beforehand to induce his brother to come within his power for the purpose of taking his life, as might pos-

sibly he inferred from some of the statements that he made, as testified to by certain witnesses, and if he succeeded in that attempt and did take his brother's life as he intended, he was guilty of murder in the first degree. If, on the other hand, he was laboring under such mental strain and excitement that he was incapable of forming a deliberate plan, and expected that his brother would leave the community where they lived, and did not have any intention of using his shotgun upon his brother, but in doing so acted upon a sudden impulse, arising from his troubles, the conversation between them and his brother's insulting behavior, and the defendant was at the time in such use of his reasoning powers as to be responsible for his act, then he was guilty of manslaughter. The question of the degree of his guilt does not appear to have been very fully presented to the jury.

The defendant induced his brother to come to the defendant's place, without first informing him of the knowledge which he had of the existing conditions, and when his brother arrived the defendant took him to a small shed where the defendant had placed his double-barrel shotgun, and, after closing the door, took his shotgun in his hands and asked his brother if he knew why he called him there. He had represented that he had called him there for the purpose of helping him with some of his calves. When the defendant acknowledged that he called him there because of his relations with the defendant's wife, and inquired what he, Charles, was going to do about it, on being asked what he, the defendant, wanted him to do, the defendant told him that he wanted him to leave the country and never show himself in that part of the country again. This Charles refused to do, but said that he would agree to never come again to the defendant's place. This was not satisfactory to the defendant, and the defendant testified that he then showed Charles the statement which the defendant's wife had written and proposed that they call her. They both then left the shed, the defendant carrying his gun. There is evidence that the defendant afterwards

stated to several witnesses that when his wife came to them she inquired of him: "Can't this be settled * * * will you take money?" He laughed and said: "Yes." "Will you take \$10,000?" she asked. He answered: "Yes." The defendant, upon the witness-stand, testified that he there said to them: "You need not think that I want any of your dirty money." If he answered as these witnesses testified that he stated out of court he did, that \$10,000 would adjust it, it might be construed that he was seeking to get money from his brother, or it might be construed that he considered the sum named so far beyond the reach of either or both of them that it amounted to a declaration that the money settlement was out of the question. However that may be, it would appear from the evidence of the defendant and his wife, and also from the statements which the defendant is alleged to have made out of court, that his brother Charles then began to treat the matter lightly, and sneeringly accused the defendant of calling him over there to get money out of him, and finally said: "Shoot, why don't you shoot?" Thereupon, the defendant did shoot, and killed him instantly.

The theory of the defense is that the defendant was so exasperated by existing conditions, and the conduct of his brother at the time, that he was unable to control himself, and was not responsible for his act nor able to distinguish between right and wrong with reference to what he did. This presents the question as to the mental condition of the defendant at the time of the act, a matter always difficult to determine, and particularly so in this case, a question not for the court, but peculiarly one for the jury. If that question has been submitted to the jury without violating the substantial rights of the defendant, their verdict must be regarded as final; it cannot be interfered with by the court. The defendant called an expert witness, a member of the medical profession and of apparently good standing, who has had experience in treating diseases of the mind and had thoroughly examined the defendant. In answer to a hypothetical question which

substantially recited the facts as testified to by the defendant and his witnesses, including evidence showing that the defendant from the time that he learned of these criminal relations between his brother and his wife was so affected mentally and physically that he was unable to perform his regular duties or even to control his own conduct and conversation, this witness testified that, in his opinion, the defendant was irresponsible at the time and was unable to distinguish between right and wrong with reference to the act which he did. In rebuttal the state produced Dr. Hildreth as a witness, who had for some time, perhaps four or five years, been the family physician of the defendant, and who had in that capacity on various occasions treated the defendant himself, and questioned him as to defendant's sanity. The defendant's counsel duly objected to the calling of this witness, on the ground that he was the defendant's physician and the information that he gained in that capacity was privileged.

1. The attorneys for the state insist that the defendant waived this privilege by answering upon his cross-examination various questions in regard to Dr. Hildreth's examination and treatment of him. Some decisions are cited which appear to hold, as maintained by Professor Wigmore, that if the person entitled to the privilege introduces evidence in regard to his physical condition at the time, it is competent to call his physician to rebut that testimony. Professor Wigmore says: "Certainly it is a spectacle fit to increase the laymen's traditional contempt for the chicanery of the law, when a plaintiff describes at length to the jury and a crowded court-room the details of his supposed ailment and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege." 4 Wigmore, Evidence, sec. 2389. He says, however: "This is generally not conceded in the judicial rulings." Sec. 2390. He appears to derive his conclusion from his reasoning, and not from the language of the statute. He is discussing what the statute ought to be, and not what it really is. Sec-

tion 333 of the code is as follows: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." The provision that "no * * * physician * * * shall be allowed, in giving testimony, to disclose any confidential communication," appears to be absolute, and it is doubtful whether the next section, which provides that this privilege shall not obtain where the party "waives the right thereby conferred," was intended to prevent a party from testifying to his physical condition, without at the same time consenting that his physician may at any time reveal his confidential communications. The question is an important one and is a question of construction of the intention of the legislature. If it is wise to introduce such an innovation into our law, it would seem to be the province of the legislature to do so. The ground upon which this waiver in this case is urged by the state is a little different from that stated by Mr. Wigmore, and perhaps a little more substantial. It is said that the defendant himself gave testimony of Dr. Hildreth's examination and treatment. If the defendant had offered these matters as evidence in his own behalf, the position of the state would be unassailable. He did not, however, do so. These matters were drawn from him by the state's attorney on cross-examination and only in answer to direct questions. It seems clear that the state ought not to be allowed to compel the witness to waive his privilege in this manner. It is said that the witness was not compelled to answer these questions, but might then have insisted upon his privilege; but this suggestion does not answer the objection. If the defendant's privilege would extend so far as to exempt him from cross-examination as to conversations and transactions he had had with others, including his physician, the state

ought not now to be allowed to urge that fact after having introduced the evidence which assumed that the defendant was compelled to answer.

2. The witness was asked this question by the state: "Doctor, based on your observations and your conversations and the different matters that you have detailed here that took place and which you have stated here which took place other than in a professional way, I will ask you, in your opinion, whether or not the defendant on that 3d day of October, 1911—what his condition was as to being sane or insane?" Defendant then was allowed to cross-examine the witness as to his qualifications, from which it appeared that the witness had been the family physician for the family of the defendant, and had treated the defendant personally in that capacity during the several years last past, and the witness stated that, if he gave him an opinion as to his mental condition, it would be based in part on what he saw of him on that day of the tragedy and what he had known of him for years, and in part on the knowledge of what he had acquired respecting him which he had acquired while waiting on him as his family physician. After the cross-examination of Dr. Hildreth, the state propounded to him this question: "You can separate the conclusions which you drew from your professional calls * * * and your observations that day? You can give an opinion on that alone?" He answered: "I can." He was then asked: "Doctor, based on your observations and your conversations and the different matters that you have detailed here that took place and which you have stated here which took place other than in a professional way, I will ask you, in your opinion, whether or not the defendant on that 3d day of October, 1911—what his condition was as to being sane or insane?" The objection interposed, that the question was leading and called for a privileged communication and the witness is incompetent, was overruled. The witness then inquired: "I am to base my answer on observations outside of my professional capacity?" The state's attorney stated:

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"Yes, sir; not to use any knowledge you acquired in a professional occupation. This question refers to that day —on the 3d day of October, 1911." The witness then gave his answer to the question as follows: "I have never seen any time that I have known Frank Larson but that I had any question as to his mental competency." On motion this was stricken out as not responsive to the question. The question was repeated, and the witness answered it as follows: "I saw nothing to indicate to me but what he was competent and sane." A motion to strike out this answer because it was incompetent, irrelevant and immaterial, and no proper foundation was laid for it, and it called for a privileged communication, and that the witness was incompetent, was overruled, and to this ruling the defendant excepted.

Under the conditions of this case as it then appeared to the jury, the evidence of this witness must have been regarded by the jury as of great importance. The witness had been the family physician of the defendant, and on the day of the defendant's arrest the defendant and his wife went into the office of the witness, and in the presence of the witness discussed the conditions that confronted them, apparently relying upon the relation that had existed between the witness and the defendant; the witness had not stated what circumstances and conditions he relied upon in forming his opinion, and the court had upon careful consideration decided in the presence of the jury that the evidence was proper, so that the jury would naturally rely upon the conclusions reached by the witness. If the evidence was properly received, it must be because the witness was qualified as an expert, because as a nonexpert his evidence was clearly incompetent under well-established rules in such cases. He made no attempt to relate to the jury the facts and circumstances and conditions upon which he based his opinion, and his testimony does not show sufficient familiarity with defendant to give any real value to his opinion.

Many courts have held that such evidence would be in-

competent on account of the relationship existing between the witness and the defendant. It has been many times said by the courts that the human mind is not competent to separate the facts of which it is cognizant into two classes—those that were obtained professionally and those facts coming within the observation of the witness not so obtained—and distinguish an opinion derived from one series of facts from an opinion derived from another. It has been suggested by some that the witness might not be competent to determine as a matter of law how far the rule of personal privilege extends, and so be able to determine what facts the law would regard as having come to him through his professional capacity. The line of questioning here seems to require the witness himself to determine these questions, and it may well be considered difficult, if not impossible, for him to do so.

However that may be, we think the evidence was incompetent for another reason. The question propounded to him did not suggest anything in regard to the defendant's situation, nor in regard to his mental condition preceding or at the time of the tragedy. If he confined himself to what he himself had observed in a social way and in casually meeting defendant, as he assumed to do, his answer would not take into consideration the most material part of existing conditions. His answers show clearly that he did not consider that he was sufficiently informed in regard to existing conditions to give a valuable opinion on the questions propounded. He does not say what his opinion as an expert would be, but says that from these casual observations of the defendant he did not see anything that would lead him to the conclusion that the defendant was insane. The jury had no means of knowing what or how much the witness had seen unprofessionally that would be of any value in determining the question. So far as his answer to the question goes, he may not have observed and remembered enough to enable him to come to any conclusion upon the question. When he was asked if he could give an opinion as to defendant's

sanity or insanity, based upon matters that came to his knowledge "other than in a professional way," he answered: "As far as that observation would go outside of my professional capacity I could. * * * I should have to have an opinion; I should have to have an opinion separate." Why would he "have to have an opinion"? Surely he would not be obliged to have an opinion as an expert without sufficient data from which to form it. His answer implies that he did not consider that his "observation * * * outside of my professional capacity" was sufficient upon which to form an expert opinion. The opinion he formed from this observation was simply the tentative opinion of the average citizen who has heard or seen only a part of the facts or transactions, and feels constrained to make a guess. He testified that during the year then last past he had seen the defendant "possibly three or four times a month. * * * It would be a very uncertain and indefinite opinion. I could not say how often I saw him." He was allowed to testify, not what his opinion was as to the sanity or insanity of defendant, but that he had not observed enough to lead him to the conclusion that the defendant was insane. This evidence we think was incompetent, and was plainly very prejudicial to the defendant.

3. It is insisted upon behalf of the defendant that the court erred in allowing the daughter of the deceased to testify to the contents of a postal card received by him. It was assumed in the question that the postal card came from the defendant, and the witness testified, over the objections of defendant, that the substance of the card was a request to the deceased to "come over in the morning and help me with the calves." There was no evidence that this card was written by the defendant. The handwriting had not been identified, and it was error to receive it in evidence. This error was clearly without prejudice to the defendant. The defendant himself, upon the witness-stand, testified that he sent this postal card to the deceased, and himself stated the contents of the card substantially as stated by the witness, and there was no ques-

tion in the case but that deceased came to defendant's place in answer to this card and other similar requests over the telephone. Surely the defendant cannot now urge that he was prejudiced by the evidence complained of.

4. In the eighth instruction given to the jury, after reciting the facts necessary to be proved in order to find the defendant guilty of murder in the first degree, the court told the jury: "If, however, the state has failed to establish each and every of the above and foregoing propositions beyond a reasonable doubt, then you should acquit the defendant of the charge of murder in the first degree." It is said that the law is that, if the state has failed to establish any one of the necessary propositions beyond a reasonable doubt, he should be acquitted. We fail to understand the reasoning of defendant's attorney in regard to this instruction, and cannot see that the instruction as given by the court was erroneous. The same objection appears to be urged to the court's instruction in regard to the crime of murder in the second degree and in regard to the crime of manslaughter.

5. In the fourteenth instruction the court, after defining the defense of insanity, uses this language: "If upon consideration of the whole testimony you are satisfied beyond a reasonable doubt that at the time of the alleged shooting the defendant was sane, then you should find against him on the issue of his insanity." It is urged that the court should have said that, unless they were so satisfied, they should find the defendant not guilty, and not merely inform the jury that they should find for or against him on the issue of insanity. There might be some merit in this objection if it were not for the fact that in several other instructions the court plainly told the jury that, unless they found beyond a reasonable doubt that the defendant was sane at the time of the shooting, they must find him not guilty. Taking the whole instruction together upon this point, the jury could not have been misled.

6. Several of the defendant's requests for instructions were refused, and this is now complained of. On examination we find that the instructions given by the court upon its own motion contained all of these matters that the defendant was entitled to and were necessary to a proper understanding of the facts presented in evidence.

7. Upon the trial the prosecutor produced the hat worn by the deceased at the time of the shooting. There is no controversy in the case as to the action of the defendant nor as to the death of the deceased. This exhibition of the torn and blood-stained hat would have no purpose except to arouse the passion of the jurors. When, however, it was offered in evidence and objected to, the offer was withdrawn, and it was not put in evidence. If this evidence had been received over the objection of the defendant, it might have constituted reversible error, as held in *McKay v. State*, 91 Neb. 281. If the prosecuting attorney, knowing that such evidence was incompetent, had purposely exhibited the hat to the jury with the intention of thereby prejudicing them against the defendant, it might have constituted such misconduct as to have required a reversal, but we do not find evidence in the case justifying the conclusion that the prosecuting attorney was in this case guilty of such misconduct.

Other questions discussed will not probably arise upon another trial.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J.

I think the defendant is entitled to a new trial on other grounds; therefore I concur in the conclusion only.

FAWCETT, J., concurring.

I concur in the judgment of reversal, but not upon the grounds assigned in the opinion. I prefer to base my conclusion upon the ground that defendant has not had an

unprejudiced trial. He had been grievously wronged. His home had been invaded and ruined by one who by every tie of kindred should have been ready to fight, if need be, in its defense, and for its sacred preservation. When the destroyer was confronted by his hapless victim, instead of humbly imploring forgiveness, he met his just accuser with taunting language which I do not think one man in a hundred, under the circumstances, could have resisted. I am not defending the "unwritten law." But I am not willing to hold that the killing of a man under the circumstances shown in this case is murder in the first degree. To hold that it is a greater crime than manslaughter is to shut our eyes to the laws of nature and the irresistible inborn tendencies of man. That the jury found the defendant guilty of murder in the first degree forces the conclusion in my mind that they were either influenced by prejudice, or did not fully comprehend their duties as outlined in the instructions of the court. In either case the defendant should be given the opportunity of presenting his cause to another jury.

ROSE, J., dissenting.

My understanding of the evidence and of the law applicable thereto is radically different from that of the majority. Defendant shot and killed his brother, October 3, 1911. This fact cannot be successfully controverted, and there is no attempt to do so. Unless the jury could have found from the evidence that defendant, at the time of the homicide, was insane within the meaning of the criminal law, there was no justification whatever for a verdict of acquittal. After defendant had adduced testimony tending to show he was insane, the state called in rebuttal Dr. Hildreth, who answered a question as follows: "I saw nothing to indicate to me but what he was competent and sane." The refusal of the trial court to strike this answer out of the record on motion of defendant is, according to the opinion, an error; and a reason given for setting aside the verdict of the jury is as fol-

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lows: "This evidence we think was incompetent, and was plainly very prejudicial to the defendant." The majority neither hold that the answer quoted was incompetent, nor that Dr. Hildreth was an incompetent witness, because his testimony violated the statute forbidding the disclosure of privileged communications. In testing the competency of his answer from the standpoint of the majority, therefore, his professional capacity must be considered in connection with other proofs. The following facts are proved: Dr. Hildreth was a graduate of Rush Medical College, Chicago. He was a duly licensed physician. He had been practicing his profession in the vicinity of the homicide for 31 years. He had known defendant about 15 years, and had been fairly well acquainted with him for 5 years; saw him a great deal not in a professional way—possibly three or four times a month. Saw him in town; saw him frequently when he was not attending him professionally. In a room adjoining Dr. Hildreth's office an inquest was held the day of the homicide. Defendant was there. For two hours he was closely observed by Dr. Hildreth, who heard him talking and answering questions, and observed the tone of his voice and his manner of speech. Dr. Hildreth testified, in substance, that he observed defendant's general conditions, and he told what they were, and that he had heard a conversation between defendant and his wife, and he stated the substance of it. Later in his examination the witness was asked: "You can separate the conclusions which you drew from your professional calls on him, and from knowledge which you had of him, and acquaintance with him formed outside of your professional calls, and your observations that day? You can give an opinion on that alone?" The answer was: "I can." He was also asked: "Doctor, based on your observations and your conversations and the different matters that you have detailed here that took place and which you have stated here which took place other than in a professional way, I will ask you, in your opinion, whether or not the defendant on that 3d day of October, 1911—what his con-

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dition was as to being sane or insane?" The question was answered: "I saw nothing to indicate to me but what he was competent and sane." The clear import of the testimony of Dr. Hildreth is that an opinion as to defendant's sanity was forced upon him by observed conditions and facts. The record, therefore, answers the question: "Why would he 'have to have an opinion'?" When the existing facts and conditions were impressed on his mind by observations, the mental operations resulting in the opinion that nothing was disclosed to indicate insanity were neither unnatural nor suspicious. The testimony condemned by the majority, if considered as the evidence of a nonexpert witness, is clearly competent, unless a former opinion of this court is overruled. *In re Estate of Wilson*, 78 Neb. 758. Considered as expert evidence of a physician not disqualified as a witness, the testimony criticised by the majority is competent under well-established rules. The contrary holding, under the facts as they exist, will, in my opinion, introduce into the criminal law of the state a new technicality which will prove to be confusing to the courts as well as dangerous to society. I do not think any sufficient reason for setting aside the judgment has been suggested in the opinion of the majority.

WILLIAM F. SMITH, APPELLEE, v. DAVID G. POTTER ET AL.,
APPELLEES; WALTER V. HOAGLAND, APPELLANT.*

FILED SEPTEMBER 28, 1912. No. 16,314.

1. **Taxation: FORECLOSURE OF LIEN: SALE: RIGHT OF REDEMPTION.** In a tax foreclosure proceeding by a county to recover delinquent taxes on the land without making a prior administrative sale, where service is obtained by publication and the premises are sold under the decree of foreclosure, the purchaser at the foreclosure sale buys subject to the right of one having a valid lien upon the premises to redeem from such sale, and the party claiming the lien cannot be barred without a hearing, if he answers setting up his defense and demands such hearing.

* Opinion modified. See opinion, p. 63, *post*.

2. ———: ———: PUBLICATION OF NOTICE. Proof of publication of notice for constructive service re-examined, and, as a preponderance of the evidence tends to show that the notice was published for the time required by statute, the former opinion is modified to correspond with this view.

REHEARING of case reported in 90 Neb. 298. *Former opinion modified, and judgment of district court reversed.*

HAMER, J.

This is an appeal from a judgment of the district court for Lincoln county quieting title in the plaintiff to a tract of land in that county. The plaintiff's title is derived by a sheriff's deed which was issued in a tax foreclosure suit brought by Lincoln county against David G. Potter and his wife and others. This case was before this court at a prior term. See 90 Neb. 298. For a more complete statement of the facts in the case we refer to the opinion heretofore published. The defendant in the court below, David G. Potter, received a patent to the land in controversy in 1887. Afterwards, in 1892, he executed and delivered a note and mortgage to A. D. Buckworth to secure the payment of a note for \$389. This note was indorsed to the North Platte National Bank, of which Buckworth was president. That bank became insolvent, and one Doolittle, who was appointed the receiver of the bank, sold the note and mortgage as such receiver. The defendant Hoagland claims to own this note and mortgage and a decree of foreclosure based upon the same, and he now claims the right to redeem from the tax lien because he owns this note and mortgage and the decree mentioned, and because the tax foreclosure proceedings upon which the plaintiff's title to the land depends are invalid. He filed an answer and a cross-petition. He claims in the answer and cross-petition the right to redeem. Lincoln county obtained a decree of foreclosure for the delinquent taxes on the land without making a prior administrative sale. Service was had by publication and the land was sold to satisfy the decree. The land was purchased at sheriff's sale by the defendant

Wilcox in 1902, and the plaintiff, Smith, receives his title through Wilcox. The plaintiff Smith denies the ownership of the decree by Hoagland, and alleges that the receiver abandoned that indebtedness.

It is claimed that Potter and his wife executed and delivered to the North Platte National Bank renewals of the note executed and delivered to Buckworth. The last of these renewal notes is claimed to have been executed in January, 1894. It is claimed that the receiver of the bank, by virtue of an order of the comptroller of the currency, advertised all of the assets of the bank remaining in his hands to be disposed of, and that he held the sale on or about the 1st day of January, 1900; that on or about the 18th day of January, 1900, he offered the notes and indebtedness secured by the mortgage and covered by the decree for sale at public auction and sold the same to one A. H. Davis, and that he delivered the notes to Davis. There was an affidavit for service by publication in the tax foreclosure proceedings. It is claimed that no valid service by publication could be had upon Potter and his wife because of the fact that they were all the time residents of the state of Nebraska and that the affidavit for service by publication was untrue. Buckworth was a resident of Lincoln county until he died in the year 1894, or thereabouts. In the tax foreclosure proceedings it is alleged that no personal service of summons was had upon Potter and his wife and upon Buckworth. This court reversed the judgment of the district court quieting title in Smith. The appellees Wilcox, Dikeman and Smith have filed a motion to vacate the judgment of reversal entered by this court, and the question is whether the judgment of this court reversing the judgment of the court below shall stand or whether a new judgment shall be rendered.

This court bases its finding that the appellant Hoagland is the owner of the note and mortgage in controversy on the opinion in the case of *McCabe v. Reed*, 88 Neb. 457. In the former opinion this court quotes from the opinion

in *McCabe v. Reed*, and say: "If the defendant in an action to cancel a mortgage produces the notes secured thereby, and it appears that he has controlled and had undisputed possession of the instruments for many years under a claim of title thereto, these facts will sustain a finding that he is the owner thereof, notwithstanding they are indorsed payable to the order of a third person." This court then ventures the opinion that the testimony of the witness Davis is not sufficient to overcome Hoagland's testimony, supported and corroborated as Hoagland's testimony was by his possession and production of the papers. As Hoagland has no rights in the premises unless he is the owner of the notes and mortgage, that is one of the first things to determine. This court said in *McCabe v. Reed*: "The delivery of a negotiable promissory note indorsed to the order of a third person will not in itself transfer title to the note (*Gaylord v. Nebraska Savings & Exchange Bank*, 54 Neb. 104), but an equitable assignment will result from the sale and delivery of the note without an indorsement, and the equitable owner may maintain an action thereon in his own name (*Greeley State Bank v. Line*, 50 Neb. 434). And the possession of an unindorsed negotiable promissory note by some person other than the payee or indorsee may sustain a finding that the equitable title followed the possession. *Cather v. Damerell*, 5 Neb. (Unof.) 175." This court further said in that case that the original note and mortgage were produced in the tax foreclosure case by the intervener, and that they had remained in his custody for more than six years, and that no other person asserted title or ownership to the same, and that *prima facie* there was proof of title in the intervener in the tax case. *Sanford v. Litchenberger*, 62 Neb. 501. It would therefore seem from the evidence that Hoagland should be treated as the owner of the note, mortgage and decree.

It is next claimed that the publication was insufficient. The publication was in a semi-weekly newspaper issued on Tuesdays and Fridays of each week. The first publication

seems to have been on the 28th of August, 1900, and the next on the 31st of August; that would make one week. The succeeding publications are on September 4 and 7, September 11 and 14, and September 18 and 21; the last making the fourth week. It would therefore seem that this objection is not well taken. In the former opinion it was held that the court acquired no jurisdiction because the notice in the tax foreclosure proceedings was not published the required length of time. The end of the four weeks was the 22d of September, 1900. The notice published required the defendants to answer five days before that time. In other words, when the service was complete the time within which defendants were to answer had expired five days before. If it shall be said that the time expired with the last publication, then the defendants were required to answer four days before that time, to wit, on the 17th of September, 1900. In conclusion, touching this matter, the answer day arrived when there had been publication for only three weeks. Section 79 of the code provides that the notice must be made four consecutive weeks, and, among other things, that it must "notify the person or persons thus to be served, when they are required to answer." Of course, this is not done in this case because the time had expired when the answer was to be made according to the language of the notice before the service was complete. Because of this defect in the notice and the time of its publication, we may well doubt whether jurisdiction was acquired, but we do not decide that question, because, while it is apparent by an examination of the case, the question is not raised or discussed by counsel, and we do not have the benefit of their research and argument, and without this no appellate court should determine the question shown by the record.

The next proposition is that the affidavit for publication states that the defendants are nonresidents of the state of Nebraska and service of summons cannot be had on them or either of them. It is said that this is insufficient, and it is argued that the affidavit should allege that service

cannot be made upon them within this state. It is claimed that Buckworth was a resident of Lincoln county until his death. It is claimed that the Potters have always been residents of the state of Nebraska and that service of summons could be made upon them in this state. If that is true, the tax foreclosure is without jurisdiction.

It is argued that the rule should be applied in this case which is said to have been established in *Britton v. Larson*, 23 Neb. 806. That was in an action of ejectment. There was a trial in the district court resulting in a verdict and judgment in favor of the defendant. The record in that case showed that in April, 1875, one Harry Brownson was the owner of the real estate in question; that on March 8, 1871, he and his wife executed and delivered to the First National Bank of Omaha a mortgage on the real estate. On the 16th of April, 1875, a summons was issued to the sheriff of Wayne county directing him and notifying the said Harry Brownson and Jennie Brownson of the institution of an action to foreclose the mortgage. A summons was returned on the day of its issue not served, the defendants not being found in Wayne county. On the next day an affidavit was filed showing the nonresidence of the Brownsons. Service was had by publication. August 24, 1874, a decree of foreclosure was rendered, and the land was sold under the order of the court, and September 20, 1876, the same was confirmed and the sheriff directed to execute the usual deed to the purchaser. On the 18th of February, 1885, Brownson and wife conveyed the land in question by a quitclaim deed to the plaintiff. The plaintiff insisted that the district court was without jurisdiction to render the decree because there was a defect in the affidavit showing the nonresidence of the Brownsons. The affidavit did not describe the property mortgaged. There was no attempted description of it. It was not described by numbers; nor was it alleged to be in Wayne county.

It was also objected that the affidavit did not show that the Brownsons could not be served with summons within the state, and therefore that the affidavit did not comply

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with the requirements of sections 77 and 78 of the code. Section 78 of the code provided that, before service could be made by publication, an affidavit should be filed alleging that service could not be made on the defendants in the state. Section 78 of the code, as it was then and as it is now, reads: "Before service can be made by publication, an affidavit must be filed, that service of a summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication." In *Britton v. Larson*, *supra*, there was cited *Carey v. Reeves*, 32 Kan. 718, to the effect that district courts are courts of general jurisdiction and presumed to have jurisdiction to render any order which they do in fact make. In its widest latitude this doctrine would not require an affidavit to be made. All the court would have to do would be to go ahead and then say: "It will be presumed that we have not made an order unless we had jurisdiction to make it." There was a motion to amend the proof of service in the Kansas case. The amended affidavit is not set out in the opinion. Perhaps it is only fair to the Kansas court that the amended affidavit should be set out before any criticism is attempted.

The affidavit for publication in the instant tax foreclosure case sets up that H. S. Ridgley is the attorney for the county of Lincoln, the plaintiff in the action, and that on the 25th of June, 1900, the plaintiff filed its petition in the district court for Lincoln county, Nebraska, against David G. Potter, ——— Potter, his wife, first name unknown, Central Nebraska Loan & Trust Company, A. D. Buckworth, first name unknown, J. I. Case Threshing Machine Company, and John Doe, true name unknown, defendants; that the object and prayer are to foreclose the tax liens mentioned in said cause of action; that "the plaintiff seeks to foreclose a tax lien upon the southeast quarter of section 24, in township 15 north, of range 33 west of the sixth principal meridian, in said county, and there is now

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due on said tax liens the sum of \$71.26. That the defendants, David G. Potter, ——— Potter, his wife, first name unknown, Central Nebraska Loan & Trust Company, A. D. Buckworth, first name unknown, J. I. Case Threshing Machine Company, and John Doe, true name unknown, are nonresidents of the state of Nebraska, and service of summons cannot be had on them or either of them. (Signed) H. S. Ridgley." The affidavit purports to have been signed on the 7th of August, 1900, before the deputy clerk of the district court. It will be noticed that the Potters, the Central Nebraska Loan & Trust Company, A. D. Buckworth, the J. I. Case Threshing Machine Company and John Doe are alleged to be nonresidents of the state of Nebraska. It is also alleged that service of summons cannot be had on them or either of them. This is a general statement. It is not alleged, as section 78 of the code provides, "that service of a summons cannot be made within this state."

It will also be seen that there is no description in the notice of the tax liens to be foreclosed. It does not appear what years they are for, nor the amount of each. There is a statement of the aggregate. Section 79 of the code provided that the notice must contain a "summary statement of the object and prayer of the petition." In *Scarborough v. Myrick*, 47 Neb. 794, it was stated in the seventh paragraph of the syllabus: "Plaintiff's cause of action is not required to be set forth in an affidavit for service by publication. It is sufficient if such affidavit states that the defendant is a nonresident of this state, and that service of summons cannot be had upon him therein, and facts showing the action to be one of those mentioned in section 77 of the code, in which constructive service is authorized." In the body of the opinion in that case it was said: "It was not necessary that the affidavit should disclose plaintiff's title to the property in controversy. He was not required to state his cause of action in the affidavit, but in his petition. *Grebe v. Jones*, 15 Neb. 312. The affidavit shows that the nature or char-

acter of the suit is one in which the statute authorizes service by publication to be had, and that is sufficient so far as that point is concerned. *Fouts v. Mann*, 15 Neb. 172; *Taylor v. Coots*, 32 Neb. 30."

The petition filed to foreclose the alleged liens is brought by the county of Lincoln against the defendants above named. It alleges taxes against the land for the years 1892 to 1898, inclusive; that the taxes for each year became delinquent in each of the years following; that the premises described were advertised and offered for sale, and returned not sold for want of bidders. The item of tax for each year is given. It is alleged of the defendant Potter that David G. Potter claims to be the owner of the premises, and that ——— Potter is his wife; that the defendant, the Central Nebraska Loan & Trust Company, claims an interest in the premises by virtue of a mortgage lien; that A. D. Buckworth claims an interest in the premises by virtue of a mortgage lien; that the defendant, the J. I. Case Threshing Machine Company, claims an interest in the premises by virtue of a mortgage lien. It is claimed that the interest of the defendants is inferior to the lien of the plaintiff by virtue of the assessment and levy of the taxes. The prayer is that an accounting be had, and the amount due the plaintiff on account of the taxes, interest and penalties be decreed a first lien upon the premises; that the defendants and all persons, except the plaintiff, be foreclosed and barred from all right, title and interest in and to the premises; that the premises be sold under a decree of the court and the proceeds applied toward the payment of taxes, interest, penalties and costs of the action; that, upon the confirmation of the sale, the sheriff be ordered to make the purchaser of said premises a good and sufficient deed, and that he put the purchaser in possession. The decree seems to have been rendered on the 2d of December, 1901. The assignment of Milton Doolittle as receiver of the North Platte National Bank to A. H. Davis seems to have been on the 8th of January, 1900.

On the 28th of March, 1908, David G. Potter and Lydia

A. Potter, defendants in the original tax foreclosure case, entered their special appearances in the instant case in the district court for Lincoln county, and allege that they appear for the purpose of objecting to the jurisdiction of the district court for Lincoln county over them, for the reason that no service of a summons had been served upon them in this action; that no attempt to serve any summons upon these defendants in this action was made, except by publishing notices in the North Platte Telegraph during the months of December, 1906, and January, 1907, as shown by the proof of publication on file; that at the time of the commencement of this action, and ever since said date, these defendants have been and are residents of Dawes county, in the state of Nebraska, and at no time since the commencement of this action have these defendants been nonresidents of the state of Nebraska. In support of this, David G. Potter files his affidavit alleging that he and his wife, Lydia A. Potter, are residents of Dawes county, where they have been residing near the town of Crawford; that no service of summons had been made upon them.

On the trial of the instant case before the Honorable W. H. Westover, sitting as judge of the district court, there was a finding that no service of summons was had in this action upon defendants David G. Potter and Lydia A. Potter, and "that special appearances of said David G. Potter and Lydia A. Potter were sustained by the court, and this action was and has been dismissed" as to the said David G. Potter and Lydia A. Potter. The court further finds that the Central Nebraska Loan & Trust Company and the J. I. Case Threshing Machine Company have been served with processes upon plaintiff's petition by publication, and the court further finds that the Central Nebraska Loan & Trust Company is a corporation, organized under the laws of the state of Nebraska, and that service upon said defendant by publication was and is invalid. A. D. Buckworth is shown by the evidence to have been a resident of Lincoln county, Nebraska, until he died.

Hoagland testified that he and Davis did the bidding, and that he and Hoagland were to divide. Hoagland testifies: "In the settlement between Davis and I about that time, Davis turned over to me all of the Potter papers, notes and mortgage and assignment which he had procured, being the assignment which is offered in evidence here, the assignment of mortgage and notes which were offered in evidence, together with another note that has not been offered in evidence." He further testified that Davis paid Doolittle, and then that he and Davis adjusted matters between them, and that Davis paid him (Hoagland) the difference in cash. He goes into the details with respect to what they said. "Q. Can you give the date of this settlement between you and Davis? A. Davis paid me the cash on January 8, 1900. He paid me the difference in cash. I am satisfied it was some time after that when we made our complete settlement and divided up the papers." He then testifies that the Potter papers have since that time been in his safe and in his possession. "Q. State if you made an examination as to service of notice of publication thereof in the case of Lincoln County against Potter *et al.* that is involved in this action. If so, when? A. Immediately after I saw the notice in the paper, I then examined the files of the court proceedings here in this office. Then, after investigating the case of the county against Potter, the tax case, I went to the office of the North Platte Telegraph. * * * I called for the files of the paper for that year. Mr. Kelly was not present, but his clerk, Miss Brown, assisted me in looking through the files. We found the files in the same condition then as they were in today when they were examined here in court. Q. That is, the same condition as to lead pencil marks and erasures? A. Yes, sir; exactly. I never examined the files of the paper for this case prior to that time, and never saw them after that time until I was preparing here for this trial in this case, when I went to Mr. Kelly and called his attention to it." He then states that was some time last fall. "Q. Do you

know what it was that you gave Davis for this asset—this note and mortgage? A. Not for this particular one; we divided up all of them, and this one came to me. Q. Do you know what you gave him at that time? A. I do not remember.”

Hoagland testifies to the details concerning the property that he turned over to Davis. “Q. I asked you what it was you gave Davis for the property you had bid in? A. C. O. Davis asset, \$3.25; O. E. and W. C. Elder asset, \$80; S. E. 18-10-30. * * * Q. Tell me what Davis turned over to you that he bid in? A. The only memorandum I have here is the D. G. Potter property.” He then testifies that one evening at home he saw in the North Platte paper William Smith against Potter, describing this land, and that he said he believed he was interested in the land, and the next morning he went down and investigated. He found the notes and mortgage and assignment in his safe. He was unable to tell why he did not get an assignment from Davis, but thought he had overlooked it. “Q. You did not get any assignment of the decree? A. Not unless the assignment of these papers carried it. Q. As a matter of fact you and Davis had no talk about the decree, did you, when you made this transfer? * * * As a matter of fact you didn’t know then that this was in decree at that time? A. I would not say that I knew it was in decree at that time, we bought the notes. Q. You would not say; you have no recollection about it now? A. No; I did investigate some of the assets of the bank prior to that time, but whether or not I learned this was in decree, I don’t know.”

He then testifies that he discovered the matter was in decree before he saw the notice in the newspaper of Smith against Potter. He seems to have at once written a letter to Mr. Davis immediately after the lawsuit was commenced. As soon as the case was started he wrote Davis for an assignment of the decree. He wrote Davis that he (Davis) had neglected in the transfer of the papers the assignment of the mortgage. “Q. From the time that

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you ascertained that there was a decree in this case, which you say you saw within six months from the time you bought these securities, what did you do toward enforcing or collecting it, up to the time you filed your cross-petition in this case? A. I took no steps in court, but I did write a number of letters trying to find out where Mr. Potter was. I wrote some letters which were returned." It seems that Hoagland sent an assignment to Davis to be executed by him, and that Davis refused to execute it. Hoagland so testifies.

Davis, when called as a witness, controverted Hoagland's testimony, but his testimony is evasive and unsatisfactory. "Q. Was there ever any talk between you and him by which he was to have these instruments? A. No; after Mr. Hoagland and I had our settlement, I got these papers after that, I was supposed to have got them. Q. What are the facts as to whether or not you and Hoagland had some kind of an arrangement or agreement at the receiver's sale?" To this question the witness testified that they agreed between themselves that when one bid on a piece of property the other would not, and that they were to divide the assets, and that Davis was to have a half section of land to be bid in for him by Hoagland, and that Hoagland was to have the Lewis mortgage for whatever it could be bid in at. Davis says: "We bought a number of assets, and among them were these two which I mentioned. We did not get a settlement between us at the time. We had Mr. Doolittle make a memorandum on his sale book of what Hoagland bought and what I bought and we were afterwards, when we got together, to put them down and see what each one was to have and to let him (Doolittle) know, so he could put them on his book and make the assignments regular. I think it was a week probably afterwards that Hoagland and I agreed on settlement of the assets, and we settled. Hoagland took them down and made a list of them, of what I was to have and what he was to have. I went to Doolittle's office across the street, and Hoagland wrote Doolittle what

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assets was coming to me and what assets were to go to W. V. Hoagland, and he instructed him to make the assignments in accordance with the statement, and Doolittle put them on his book that way. We figured up the amount, and I think I paid Hoagland, and Hoagland paid Doolittle, if I remember right. Among the assets which came to me was the land over south, with a number of others, among which was this assignment of the Potter mortgage." Davis then testifies that at the time he and Hoagland went to see Doolittle they had not determined how the property was to be divided, but he says that Doolittle assigned them and turned them over. Davis admits that Hoagland wrote him the letters which Hoagland says he wrote. Davis says he does not remember anything about the decree until about the time he received Hoagland's letter.

On cross-examination, Davis admits that he got a letter from Hoagland after he moved to Grand Junction. "Q. How did it come that you sent this to Mr. Wilcox as soon as you received this from me? A. I do not recollect ever having assigned to you this Potter matter at all, and I did not know what I had done with that or what become of it. I made a hunt through a bundle of those old assets, with a number of others, to see if I had any Potter assets, and I found I did not have. I immediately wrote Mr. Wilcox and told him to investigate and see what there was in it, that it was probably of value to you; if it belonged to you, you were entitled to it, and, if it belonged to me, I wanted it. Q. Have you ever made any demand upon me for it? A. No, sir. Q. Did you get the list from the receiver at the time you bought these assets, a list of what you had bought? A. No; I made a memorandum of what I bought and what you bought. Q. What you bought? A. What we bought together." He then testifies that he does not know what he did with the list. He does not know whether the receiver gave him a list. Davis in his testimony corroborates the testimony of Hoagland as to the material things. He corroborates

Hoagland as to the fact that they acted together, and that they had a division, and that Hoagland took the papers. There is an attempted denial of Hoagland's rights based upon the fact that there was an assignment of the decree.

We think the evidence fully establishes the fact that Hoagland is the owner of the note, mortgage and decree, and that he has been the owner of the same ever since the sale by Doolittle, the receiver of the bank. As Hoagland was not made a party defendant, or any one representing him, and the owner of the note, mortgage and decree was not brought into court at any time, it would seem that the claim in question is not barred, unless the statutes and decisions affecting the matter created such bar. That every man is entitled to his day in court expresses a primary principle concerning the disposition of property and the enforcement and guaranty of property rights.

Sections 1-11, laws 1875, p. 107, entitled "An act to provide a method of foreclosing tax liens upon real estate in certain cases," furnish a method of foreclosure under which the premises in this case were sold. Section 1 provides that the tax lien upon real property may be enforced "by an action in the nature of a foreclosure of a mortgage." Section 3 provides that all petitions for the foreclosure of such tax liens "shall be filed in the district court in chancery, where the lands are situated." Section 4 provides: "Service of process in causes instituted under this chapter, shall be the same as provided by law in similar causes in the district courts, and where the *owner of the land is not known*, the action may be brought *against the land itself*, but in such cases the service must be as in the case of a nonresident." Section 9 provides: "All lands sold by the sheriff by virtue of this act shall be appraised, advertised and sold as upon execution, and the title conferred by his deed shall be entitled to all the presumptions of any judicial sale." Section 4 of the act contemplates proceedings the same as provided by law in *similar causes* in the district courts, and, where the owner

of the land is *not known*, then that the action may be brought against the *land itself*, but in such cases the service must be as in the case of a nonresident. The purpose in any event is to give notice. The proceedings are clearly *in personam*, unless brought against the land itself. In this case the parties interested were sought to be brought into court, but were not. This was *not a case against the land*. It was directed against the parties interested. Section 6 of the act makes the deed a bar where the land is made a defendant in the suit, but that is not this case. The Potters, who made the mortgage, were not brought into court; Buckworth, to whom the mortgage was made, was not brought into court; neither was the North Platte National Bank to which he assigned it; neither was the receiver of the bank brought into court. It is claimed that there is no necessity for bringing these parties before the court. The statute itself would seem to dispose of the matter. The action to foreclose a tax lien is to be "in the nature of a foreclosure of, a mortgage." In the case under consideration there was no allegation that the *owner of the land was unknown*. The action was fairly a personal action. There was no order, as the act provides, to have the land substituted as a defendant. No attempt of any kind was made to get service against the land.

In *Carman v. Harris*, 61 Neb. 635, the court said: "The decree, of course, could only bind the parties to the suit, and those claiming under them, and could not affect third parties." In *Alexander v. Thacker*, 30 Neb. 614, the court said: "In a suit to foreclose a lien for taxes, all parties having an interest in the real estate are proper parties, and the person holding the equity of redemption is an indispensable party." In *Carson v. Dundas*, 39 Neb. 503, the fourth paragraph of the syllabus reads: "A sale to satisfy tax liens, when the action was brought *in personam* and not against the land itself, passes only the title of the parties to the action and their privies in estate. It does not divest the title of strangers." In *Merriam v. Goodlett*, 36 Neb. 384, the court said: "As

the mortgagee was not a party, if the mortgage lien is not barred, no doubt he could proceed in an action to redeem by setting up the necessary facts to entitle him to such relief."

In *Selby v. Pueppka*, 73 Neb. 179, there was a suit in equity brought by the grantee of the original owner to redeem land sold for taxes at a judicial sale. There was a general demurrer to the plaintiff's petition, which was sustained by the court. The plaintiff elected not to plead further, and from a judgment of dismissal brought error to this court. There had been a sale for taxes by the sheriff of Rock county upon a decree of foreclosure entered at a suit of Rock county as plaintiff. There had been no administrative sale for taxes. Rock county undertook to foreclose a tax lien without resorting to a sale. It procured the premises to be sold to the defendant's grantor and the sale was confirmed, and a sheriff's deed was issued upon the order of confirmation. Afterwards this title was conveyed to the defendant. The owner at the time of the assessment of the taxes afterwards conveyed to the plaintiff, and the plaintiff brought his action to redeem from the taxes, alleging that the foreclosure proceedings were all void, for the reason that the petition in that action showed that there had been no prior sale of the premises for taxes. The petition also urged that the constitution of the state allowed a redemption within two years from any tax sale. In favor of the alleged judgment, it was urged that the fact that a petition was demurrable did not make the decree of a competent court subject to collateral attack where the parties were before it and the subject matter was one of which the court had cognizance. To the claim of the plaintiff that two years' time for redemption from a sale for taxes had not run, it was replied that the decree of confirmation was as conclusive as to the sale as that of foreclosure is to the lien and the right to sell under it. It was urged that to permit a redemption was to allow a collateral attack upon the decree of confirmation. Com-

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missioner HASTINGS, speaking for this court, said: "So far as plaintiff's first contention is concerned it would seem that defendant's claim is good." It should be said on behalf of this court, however, that it reversed the decree of the district court upon the ground that the second contention of the plaintiff, that he had a right of redemption, was good. The court said: "The terms of the constitution are very sweeping. Art. IX, sec. 3. A right of redemption is given from all sales of real estate for the nonpayment of taxes for two years after the sale. This provision has been held to be self-executing. *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109. It has also been declared to apply to judicial sales as well as administrative sales. *Logan County v. Carnahan*, 66 Neb. 685." The court then said: "The confirmation applied only to the regularity of the proceeding. It held the sale valid and regular, but in no way adjudicated the right of redemption from it. The latter existed by virtue of a self-executing constitutional provision independent of the court."

Judge DUFFIN, as commissioner of this court, delivered the opinion in *Clifford v. Thun*, 74 Neb. 831. In speaking of *Selby v. Pueppka*, *supra*, he says: "In that case it was urged that the confirmation of the sale and the making of a deed cut off the owner's right to redeem," but he does not say that was the decision. As we have just seen, it was not. In that case Clifford, who was the plaintiff in error, filed his petition for the foreclosure of a mortgage on 80 acres of land made to the Globe Investment Company by Henry Thun and his wife. The petition was filed February 21, 1903, and September 5, 1903, he filed an amended petition, in which he alleged that on August 6, 1901, the land covered by his mortgage was sold for the delinquent taxes due thereon for the years 1895-1900, both inclusive; that one Skillman was the purchaser at said sale, and that Skillman on August 21, 1901, commenced an action to foreclose his tax certificate, making various parties defendants; that a decree was entered fore-

closing tax liens held by Skillman and one Toy, and that on December 24, 1901, all the real estate was sold to satisfy the decree, and that Thun became the purchaser; that the plaintiff was the owner and holder of a mortgage made by Thun to the Globe Investment Company covering the premises in controversy, and that the same was due, and he prayed to be allowed to redeem the premises from the tax sale foreclosure, and for the foreclosure of his mortgage. Henry Thun demurred to this amended petition, alleging it did not state facts sufficient to constitute a cause of action. The right to redeem alleged in the amended petition was in addition to the matter contained in the original petition. It was urged that the plaintiff owning the mortgage at the time of the foreclosure of the tax certificate was not made a party defendant and that his right of redemption was not extinguished by the decree. Judge DUFFIE then says: "The plaintiff by his bill is seeking to enforce a *right* of redemption as distinguished from an *equity* of redemption, a right based upon a provision of the constitution and the statutes of the state, and it is by these provisions that his right is to be measured and determined, and not by the decree entered by the district court in the tax foreclosure action, which, as before stated, did not attempt to determine or cut off the privilege awarded him by the laws of the state to redeem from the tax sale within two years from its date. The difficulty under which he labors is that this right was not asserted within the time limited, and his right to redeem has been barred by lapse of time, not by the decree, but by statute." The judgment of the court below was affirmed.

An examination of these cases show that there was no discussion of the act in question. The trouble about these cases is that the lawyers and judges neglected to hunt up the statute and discuss it. More than that, the court attempted to and did bar the rights of the plaintiff without an examination of the facts of the case. It is rather difficult to understand why he would refuse to consider the foreclosure of the mortgage.

Commissioners DUFFIE and HASTINGS seem to hold in the cases above mentioned that, because one who is a party to the foreclosure may still redeem at any time within two years after the sale under the foreclosure, therefore that when he is not a party he is also barred. In *Hall v. Moore*, 75 Neb. 693, there is no discussion of the statute under consideration. That was an action to foreclose certain tax liens. The appellant, Maud M. Keck, procured an assignment to herself of the mortgage in the case. In disposing of this case Commissioner AMES said: "In the opinion of the writer there is much reason to doubt whether a mortgagee is even a proper party to such a suit, but he is certainly not a necessary one." The question was not before the court in any way and what he said was a mere dictum. To do what the learned commissioner seems to have contemplated would be a clear violation of section 3, art. IX, and sec. 13, art. I of the constitution. It would also be in violation of the act. "The suit authorized by statute is one not merely to establish the right to redeem from a tax sale, but to effect a redemption." 2 Desty, Taxation, p. 891. "In any judicial proceeding the court which assumes to act must have that authority of law for the purpose, which is called jurisdiction. This consists in, *first*, authority over the subject matter; and, *second*, authority over the parties concerned. The first comes from the statutory law, which designates the particular proceeding as one of which the court may take cognizance when the parties are properly before it; the second comes from the proper institution of proceedings, and the service of process upon the parties concerned, or something which is by the statute made equivalent to such service." Jurisdiction of the subject matter "must come wholly from the constitution or statutes of the state." 2 Cooley, Taxation (3d ed.) p. 879.

That the tax lien is to be enforced "by an action in the nature of a foreclosure of a mortgage" means that the procedure shall be similar to the foreclosure of a mortgage, and there should be no severity unusual to that

sort of procedure. The act seems to contemplate the bringing of the parties before the court in the same way that they are brought before it when a mortgage is foreclosed. There should be no attempts by the courts to add to the statute by providing harsh measures that are penal in their character.

The notice was published in August and September, 1900. It was directed to "David G. Potter, and ——— Potter, his wife, * * * Central Nebraska Loan & Trust Company, A. D. Buckworth, first name unknown, J. I. Case Threshing Machine Company." An examination of the record leaves the matter perhaps in some doubt as to whether Potter and his wife were residing in Nebraska or South Dakota at that time, and Dr. Buckworth, it seems, was dead, having died about that time at North Platte, in Lincoln county. He was the president of the North Platte National Bank up to the time that it failed. The Potters and Buckworth should have been served with a summons so that the court might have jurisdiction. The Potters made the mortgage to Buckworth, and Buckworth or his legal representatives should have been served with a summons. Buckworth might have turned the note and mortgage over to the bank, but, if so, the bank should have been brought in. Under the evidence and the rule in *McCabe v. Reed*, 88 Neb. 457, Hoagland was shown to be the owner of the note, mortgage and decree.

While there may be some doubt about the facts, as the pleadings are very long and much involved, and the testimony voluminous, we are constrained, after a somewhat careful examination of the record, to modify our former opinion touching the length of time the notice for constructive service was published, and to hold that it was published the required length of time, four weeks, but we adhere to our former views as stated in the opinion filed November 28, 1911, that the testimony of the witness Davis is not sufficient to overcome that of Hoagland, supported as it was by his possession and production of the papers, and that Hoagland is not barred by the foreclosure

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proceedings, which were so far void as to fail to convey title to Wilcox, and that he, said Hoagland, should be allowed to redeem from the tax lien by virtue of his ownership of the note and mortgage and decree of foreclosure based thereon, and by reason of the invalidity of the tax foreclosure proceedings upon which plaintiff's alleged title to the land is based.

As thus modified, we adhere to our former opinion, and the judgment of the district court for Lincoln county stands

REVERSED.

SEDGWICK, J.

I concur only in the result reversing the judgment of the district court.

LETTON, J., dissenting.

The evidence shows that Potter, the owner of the land, was a nonresident and that he was served by publication. Since the conclusion therefore rests upon that portion of the opinion which holds that a mortgagee is a necessary and indispensable party in an action to foreclose a tax lien under the statute of 1875, I am compelled to dissent. This is a new doctrine in this state and directly overrules what has heretofore been considered to be settled law. Moreover, the former cases are not specifically overruled. Since it is probable that lands have been purchased in reliance upon titles acquired under proceedings based upon the ruling formerly announced, the doctrine has become a rule of property which should not be interfered with. Neither do I agree to the proposition that such an action is purely one *in personam*. Its only purpose is to subject to sale a specific tract of land upon which the county and state have already acquired a lien, in order to pay the taxes levied and assessed against that particular tract. No personal judgment can be rendered and no deficiency enforced. It is an action *quasi in rem* and not purely *in personam*.

It is a settled rule in this state that a tax lien is superior to the lien of all other incumbrances, whether created before or after the inception of the lien. *Eddy v. Kimmerer*, 61 Neb. 498; *Merriam v. Goodlett*, 36 Neb. 384; *Mutual Benefit Life Ins. Co. v. Siefken*, 1 Neb. (Unof.) 860. A valid tax sale creates an independent title unconnected with and superior to all other interests. In administrative sales notice to the owner or occupant of the land is sufficient under the statute to bind all persons claiming interests therein. This is the general rule of other states. *Parker v. Baxter*, 68 Mass. 185; Black, Tax Titles (2d ed.) secs. 338, 340, 341.

We have held that the word "owner" in the 1875 statute, under which the foreclosure action was brought, means the same as when used in the general revenue law. In *Leigh v. Greene*, 62 Neb. 344, a like case to this, which held that one Patrick, a mortgagee, was not a necessary party, in the opinion by ALBERT, C., after reciting a number of provisions of the revenue law in which the word "owner" appears, it is said: "These, and many other provisions of the revenue act, clearly indicate that the legislature used the word 'owner' in the popular sense, the sense in which it is understood by the people at large; and having employed it in that sense in the other parts of the act, the inference is warranted that they used it in the same sense in the sections providing for the foreclosure of tax liens. *Tracy v. Reed*, 38 Fed. 69. At first sight, it may seem anomalous that a person should be concluded by a proceeding to which he was not a party and of which he had no notice. But it must be kept in mind that the procedure providing for the foreclosure of a tax lien is a part of the revenue system of the state, and that the necessities of a government will not always permit an overscrupulous regard for private rights. * * *

In our opinion, Patrick was not the owner within the meaning of the statute, and the proceedings for the foreclosure of the tax lien were in substantial compliance with the statute, and conclusive against the whole world." This

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case was appealed to the supreme court of the United States (193 U. S. 79), and affirmed upon another ground, but the holding of the opinion quoted, and in the same case on rehearing (64 Neb. 533), as shown in the fourth paragraph of the syllabus, as to the meaning of the word "owner" in this statute, has never been overruled or receded from by this court, and has several times been reaffirmed. *Clifford v. Thun*, 74 Neb. 831; *Hall v. Moore*, 75 Neb. 693.

It is certainly more in consonance with the proper conduct of the public business and the collection of money with which to carry on the affairs of government that the holder of a mortgage on a tract of land should be charged with the duty of protecting his lien by seeing, either that the taxes are paid by the owner of the equity of redemption, or by paying them himself, rather than by compelling the tax collector or the holder of the tax lien to search the records or to look for hidden liens, all of which by statute are subject and inferior to the lien of the taxes. The tax in this state is not levied upon the person owning the land or upon the lien holder. It is not a personal tax, and cannot be collected except from the land. It is the land itself that is charged with the payment. If the owner or occupant alone are entitled to notice in administrative sales, and a mere lien holder is bound to take notice of the statute, why is he not equally bound to take notice of other proceedings to enforce a tax which has been delinquent for years? I believe the former doctrine reaffirmed so recently by the court should be upheld. Even if the present construction might have been adopted at first, a rule of practice long approved should not be lightly set aside, especially when titles to land depend upon it. It is such vacillation that breeds litigation, since no lawyer can safely advise his client, when the court itself does not adhere to settled rules.

ROSE, J., concurs in this dissent.

The following opinion on motion for rehearing was filed December 18, 1912. *Rehearing denied; former opinion modified:*

PER CURIAM.

A motion in the alternative for a rehearing, or for a modification of our former opinion by striking out of the statement in the opinion, "and that Hoagland is not barred by the foreclosure proceedings, which were so far void as to fail to convey title to Wilcox," the latter clause of said statement. Upon a reconsideration of the case, it is *held* that the motion for rehearing be denied, and the motion to modify sustained. The words, "which were so far void as to fail to convey title to Wilcox," are therefore stricken out of our said opinion.

FORMER OPINION MODIFIED.

**FRANK C. MARSH ET AL., APPELLEES, V. VILLAGE OF
TRENTON, APPELLANT.**

FILED SEPTEMBER 28, 1912. No. 16,663.

1. **Municipal Corporations: DETACHING TERRITORY: REVIEW.** Upon an appeal from the judgment of the district court under section 8978, Ann. St. 1907, to detach territory from a village, the judgment of the district court will be affirmed, unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law. *Bisenius v. City of Randolph*, 82 Neb. 520; *Gregory v. Village of Franklin*, 77 Neb. 62; *Michaelson v. Village of Tilden*, 72 Neb. 744.
2. **Evidence** examined and found to sustain the judgment of the district court.

APPEAL from the district court for Hitchcock county:
ROBERT C. ORR, JUDGE. *Affirmed.*

W. S. Morlan, for appellant.

C. E. Eldred and J. W. Cole, *contra*.

HAMER, J.

The appellees, Frank C. Marsh, John C. Stalter, George Hirschfield and five other persons, filed their petition in the office of the clerk of the district court for Hitchcock county, seeking to have certain territory therein described detached from the village of Trenton in said county. In addition to the allegations that they are legal voters, except as to a part, and the exclusive owners and in possession of said territory, they say in their petition (a) that when the village was incorporated large tracts of wild, grazing and purely agricultural lands "in all directions from and outside of the platted lots, blocks, streets and alleys of said village," including the lands and territory sought to be detached, were incorporated in said village; (b) that the lands and territory sought to be detached are purely agricultural, and are used by the owners "for farming, grazing and stock-raising, and as rural residences, and no part is laid out into village blocks, or lots, and there are no streets, alleys or thoroughfares except the public highway "on the section line dividing section 2, township 2, range 33, from section 35, township 3, range 33," and which road was laid out by the county commissioners and extends many miles east; and (c) that the case was submitted on the petition of the plaintiffs, Frank C. Marsh, John C. Stalter, George Hirschfield, John H. Brown, Ralph S. Otis, Nannie Marsh and Mattie Stalter, the amended answer of the defendant, the village of Trenton, and the reply, and the evidence; and that the court found in favor of the said plaintiffs named (the name of the plaintiff Thornhill being omitted from the list) and the territory disconnected by the judgment of the district court includes only the tracts indicated on plat "exhibit A" as the Hirschfield, Stalter, Marsh and Brown tracts,

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leaving the Thornhill tract, including what had been a part of Wayne street and an unplatted tract west of it, between the Brown tract and the village, and also leaving between the Hirschfield tract and the village three small unplatted tracts and the park and a part of that territory formerly platted as "Wayne street of the village of Trenton," all the land east of the village and between the Brown tract and the Hirschfield tract being left out of the judgment detaching the territory, and Wayne street seems to have been vacated after the proceedings were begun, and therefore an uncertain quantity of land, approximating 40 acres more or less, has been left unplatted between the village and the land sought to be retained in the village, and the east line of sections 35 and 2 are now the east boundary line of the corporate limits of the village of Trenton; (d) that the territory sought to be detached is no part of the village, does not conduce to the welfare of the village or its citizens, except that its retention in the village would enable the raising of more revenue, but that the assessment, levy and collection thereof would be unjust and inequitable. The plat filed with the petition shows the relative size of the several tracts sought to be detached. The amended answer admits the incorporation of the village, and that the plaintiffs respectively reside on and own the lands described in their petition, also alleges the lien of \$6,000 in bonds upon all lands included in the village. The reply is a general denial. The land detached by the judgment of the court is as follows: Nannie Marsh's land, 5 acres; John H. Brown's land, 8.75 acres; Mattie Stalter's land, 300 feet by 634 feet; George Hirschfield's land, 300 feet by 300 feet. The land in question is shown by the plat attached to the record.

It is urged in the appellant's brief that these parties carry on business in the village or perform their official duties at the court-house in Trenton as county officers; that they and their families get their mail at the village post office; that they trade at the village stores, and send their children to the village school, and use the village

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streets, and enjoy the convenience of having their purchases delivered by the merchants, and that they partake equally of all the benefits and advantages of village organization and government, along with the other inhabitants of the place. It is also said that the tracts are used chiefly as residences, but that they have small orchards, gardens and alfalfa patches, and keep domestic animals in the way of horses, hogs and cows. The judgment of the district court granted the petition of the plaintiffs, except as to the plaintiff Thornhill whose name is dropped from the proceedings.

It is contended by the appellant, the village, (1) that the petition does not state facts sufficient to constitute a cause of action; (2) that the finding and decree of the court is not sustained by sufficient evidence, and that the testimony introduced by the applicants clearly establishes the fact that the village could "reach out and connect the territory," and for that reason that the district court should not have granted the petition. It is urged that the petitioners "should not be allowed to secede over the objections of their fellow villagers." Section 8978, Ann. St. 1909, provides, among other things: "If the court find in favor of the petitioners, and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly." The case of the *Village of Hartington v. Luge*, 33 Neb. 623, is cited in support of the appellant's contention that the land might be annexed to the village, and therefore that it should not be disconnected. In the opinion in that case it is said: "It will be seen that to justify the annexation of territory it must appear that such territory, or some part, would receive material benefit from the annexation, or that justice and equity require such annexation. Unless one of these conditions exist, there is no authority in a village board or the district court to annex territory;" but, in the opinion it is said: "If this action could be sustained upon the facts pleaded and prayed, then a village might annex a whole township or county, as such

annexation could be placed upon the same grounds as it is sought to predicate this action upon. This cannot be permitted." It may be a little difficult to determine exactly what "justice and equity" require in this sort of case. In *City of Wahoo v. Dickinson*, 23 Neb. 426, it was held that the court had power, in a proceeding instituted for the annexation of territory to a municipality, to consider and determine whether that real estate would receive material benefits, and also whether justice and equity required such annexation.

In *Bisenius v. City of Randolph*, 82 Neb. 520, it is said by Mr. Justice ROOT, speaking for this court: "In *State v. Dimond*, 44 Neb. 154, * * * we adopted from the opinion of Mr. Justice Mitchell in *State v. Village of Minnetonka*, 57 Minn. 526, a definition of the conditions essential to vest county commissioners with power to incorporate territory within a municipality; that is, such lands must 'have some unity of interest with the platted portion, in the maintenance of a village government.'" Mr. Justice POST is quoted as saying in the opinion in *State v. Dimond*, *supra*, "that the rule applied is not only reasonable, but safe and logical." This court has said, in the third paragraph of the syllabus in *Bisenius v. City of Randolph*, *supra*: "Upon an appeal in an action under said statute (sec. 8978), the judgment of the district court will be affirmed, unless it is made to appear that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." It would seem that the foregoing rule disposes of this case. In that case Judge ROOT, in the body of the opinion, says: "Plaintiff's realty forms two compact tracts of farm land aggregating over 200 acres, separated only by a road; that not only is this land not platted, but there intervenes between it and the platted portion of defendant unplatted real estate used for pasturage." In the instant case there is an unplatted tract between the village and the land sought to be detached; also the land detached is not cut up into lots and blocks and streets and alleys. Judge

Root in the case cited further says: "None of the municipal improvements extend to plaintiff's said property, and he devotes said real estate to farming purposes exclusively." All that is said in the case cited touching the failure of municipal improvements to extend to the plaintiff's property applies to the instant case. In the case cited it was alleged and proved that the village was ready to furnish the plaintiff with electric lights. Notwithstanding that fact, this court, through Judge Root, say: "Notwithstanding this evidence, we are of opinion that the land under consideration does not have a unity of interest with the platted part of said city in the maintenance of municipal government, and that the district court ruled correctly in so finding. We are bound by those findings, unless it appears that the trial judge committed an important mistake of fact or an erroneous inference of fact or of law, and that he has not done." The opinion cites *Michaelson v. Village of Tilden*, 72 Neb. 744, and *Gregory v. Village of Franklin*, 77 Neb. 62. The authorities cited sustain the position taken.

In *Michaelson v. Village of Tilden*, this court held that a judgment of the district court in a proceeding under the statute to detach territory from a municipal corporation would not be impeached upon appeal, in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of fact or of law. The foregoing is substantially the syllabus adopted in that case. The case seems to be on a parallel with the instant case. The action was a proceeding by the owners in severalty of contiguous tracts of land to procure their detachment from the village of Tilden. Commissioner AMES wrote, in the body of the opinion: "In the absence of evidence of any specific fact or circumstances tending to impeach the justice of the decree, we do not see how we can intelligibly revise it." He says that the trial judge was probably personally familiar with the land and with the village and with the situation and surroundings, and that his judgment may have been influenced "by evidence

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of the most weighty character. * * * If the record disclosed anything from which it might be contended that the judge committed an important mistake of fact, or had made an erroneous inference of fact or of law, the case would be other than it now is, and might call for a review, and a reversal or affirmation of his findings." The learned commissioner concludes: "We do not see how his determination can be impeached for want of equity, in the absence of apparent error in some of the respects named."

In *Gregory v. Village of Franklin*, 77 Neb. 62, it was held: "A judgment of the district court in a proceeding under the statute, * * * to detach territory from a municipal corporation, will not be impeached upon appeal, in the absence of a showing that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." The former case of *Michaelson v. Village of Tilden*, 72 Neb. 744, was followed and approved. In that case the village contended that at the time of its incorporation it had a population of 290, and that its population had increased until the village contained 900 inhabitants; that the plaintiffs became severally owners of said land a long time after the incorporation, with full knowledge that the land was included within the corporate limits of the village. It was admitted that the land was used for agricultural purposes, but alleged that it was adapted to being cut up into residence lots. Commissioner OLDHAM, in writing the opinion of this court in the case last cited, emphasizes the holding of the court in *Michaelson v. Village of Tilden*, 72 Neb. 744, to the effect that a judgment in a proceeding under the statute "to detach territory from a municipal corporation will not be impeached upon appeal, in the absence of a showing that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." He says: "There is certainly nothing before us in this record that shows either a mistake of law or fact by the trial judge. The right to have unplatted farm lands disconnected from the corporate limits of cities and villages has been asserted

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by this court in actions entirely independent of this section of the statute." He concludes with the statement that "there is nothing in the answer of the village which interposes an equitable objection to the prayer of the petition." The judgment of the district court was affirmed.

In *Village of Wakefield v. Utecht*, 90 Neb. 252, section 8977, Ann. St. 1909, was construed and was "held broad enough to permit a village located upon the border of one county, in a proper case, to annex contiguous territory situated in an adjacent county," but it was held that the burden of proof "in an action to annex additional territory to a village * * * is upon the village to establish by sufficient averments and evidence that the territory sought to be annexed will be benefited by the annexation, or that justice and equity require that such territory be annexed." It was held that the evidence was insufficient to sustain the decree which annexed certain territory to the village of Wakefield.

In *Winkler v. City of Hastings*, 85 Neb. 212, it was held: "Where legislative power to detach territory from a city has been delegated by statute to the mayor and council, an appeal from the action of that body in refusing to disconnect particular tracts cannot be made the means of transferring such power to the district court." In that case the court cited the *City of Hastings v. Hansen*, 44 Neb. 704, where it was held that "the power to create municipal corporations and the power to enlarge or restrict their boundaries are legislative powers; and it has been doubted if the legislature can pass a valid act giving courts jurisdiction to disconnect by decree any part of the territory of a municipal corporation of the state merely at the suit of the owner thereof." Judge ROSE, in delivering the opinion of this court in *Winkler v. City of Hastings*, said that the form in which the act amending section 4 of the charter in that case was passed conferred upon the mayor and council authority to detach territory by ordinance, and that the same was legislative; that, "in attempting to confer the same power upon the district court by direct appeal

from the action of the mayor and council if they refuse to pass an ordinance detaching territory on demand of a landowner, the legislature did not observe the following provisions of the constitution: * * * Const., art. II, sec. 1. This section of the constitution prohibits the judicial department from exercising any power properly belonging to the legislative department, and the effort to confer upon the district court legislative authority to sever agricultural and horticultural lands from the city of Hastings in the manner described invalidates the amendment to section 4 of the Hastings charter." In the opinion he distinguishes between the principle involved in the instant case and the *City of Hastings v. Hansen and Winkler v. City of Hastings, supra*. Section 1, art. III, ch. 13, Comp. St. 1901, provides that cities having more than 5,000 and less than 25,000 inhabitants shall be governed by the provisions of this act and be known as cities of the first class. Section 4 provides that the corporate limits of such city shall remain as heretofore, and the mayor and council may by ordinance include therein all the territory contiguous or adjacent which has been subdivided into parcels containing not more than five acres, and in the same way may compel the owners of lands so brought within the corporate limits to lay out streets, ways and alleys, and may vacate any public road to secure regularity in the system. Section 5 provides that land shall be deemed contiguous to such city though a stream, embankment or strip of land not more than 200 feet in width lies between said land and the corporate limits of the city. Section 6 authorizes the proprietor of land within the corporate limits, or contiguous to the same, to lay out and plat into lots and blocks and streets and alleys, and to acknowledge the instrument before an officer, and to dedicate the streets and alleys to the use of the public, and to file and record the instrument in the office of the register of deeds, when it shall have the effect of a deed in fee simple conveying the same from the proprietor to the city. Power is given the city, through its mayor and council, by ordinance

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to vacate any plat or addition as the city may deem for its best interests, the power to be exercised upon the petition of the owner. It was this power directly conferred by statute upon cities of the first class, to which Hastings belongs, that gives such cities exclusive jurisdiction to detach territory and to vacate platted parts of the city. This authority does not belong to towns and villages.

Under the rule laid down in *Biscnius v. City of Randolph*, *supra*, and the decisions of this court upon which the opinion in that case is based, the judgment of the district court was properly exercised, and there appears to be no reason for setting aside its judgment. As announced in *Bisenius v. City of Randolph*, *Michaelson v. Village of Tilden*, and *Gregory v. Village of Franklin*, *supra*, a judgment in a proceeding under the statute "to detach territory from a municipal corporation will not be impeached upon appeal, in the absence of a showing that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law." There is no such showing, and the judgment of the district court seems to be fully warranted.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J.

I concur only with result affirming the judgment of the district court.

ROSE, J., dissents.

JONATHAN HEYWOOD ET AL., APPELLANTS, v. JOSEPH HEYWOOD ET AL., APPELLEES.

FILED SEPTEMBER 28, 1912. No. 16,665.

1. **Wills: CONSTRUCTION.** The provisions of a will, like all other contracts, must be construed with a view of carrying out the intention of the testator, and unless there is something in it con-

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trary to the law of the state, or in contravention of public policy, it will not be declared invalid. *St. James Orphan Asylum v. Shelby*, 60 Neb. 796.

2. ———: ———: **AMBIGUITY.** The testator was the owner of a 240-acre farm "in Pleasant Valley township," otherwise described as the west half of the northwest quarter of section 13, and the south half of the northeast quarter, and the east half of the southeast quarter of section 14, all in township 19, of range 5 east of the sixth principal meridian, in Dodge county, on which resided his two sons, Joseph Heywood and Thomas J. Heywood, who were farming the same, and to whom he desired to devise the said farm subject to the life estate of his wife, Katherine Heywood, and he so informed the witness who drafted the will, and who then made a rough draft of the proposed will from which he shortly afterwards prepared the will itself, leaving out of it one of the three eighties which constituted the farm; at the time the will was made the testator only owned one farm "in Pleasant Valley township," and he owned in township 19, of range 5 east, the 240 acres of land above described and no other land in that township, so that the land is identified with the particular farm intended to be devised to the two particular sons so named in the will.
3. ———: ———: **EXTRINSIC EVIDENCE.** Where the intention of the testator is to be gathered from the will itself and from the extrinsic evidence of facts surrounding its execution, such extrinsic evidence is admissible for the purpose of ascertaining whether a state of facts existed at the time the will was written which corresponded with the words used and the aim of the testator. Such evidence may not be admitted to vary the terms of the will or to add anything to it so as to arrive at an intention not expressed in it, but to harmonize the language used by the testator with the facts referred to, and thus to arrive at the testator's intention as expressed in the will, and a ruling which makes the will and the facts inconsistent is not to be adopted.
4. Evidence examined and found to sustain the judgment of the district court.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

F. W. Button, for appellants.

A. H. Briggs, contra.

HAMER, J.

This is an appeal from a judgment of the district court for Dodge county construing a will and quieting title in Joseph Heywood and Thomas J. Heywood, subject to the life estate of Katherine Heywood, in 240 acres of land described as the west half of the northwest quarter of section 13, and the south half of the northeast quarter and the east half of the southeast quarter of section 14, all in township 19, of range 5 east of the sixth principal meridian, in Dodge county. It is claimed by the appellants that the evidence is insufficient to support the decree. It is urged that the 80-acre tract in section 13 was not included in the will, and therefore that it descends to the heirs. Omitting the formal part of the will it reads: "First. I order and direct that my executrix, hereinafter named, pay all my just debts and funeral expenses as soon after my decease as conveniently may be. Second. After the payment of such funeral expenses and debts, I give, devise and bequeath my entire estate, both real and personal, to my beloved wife Katherine Heywood, she to have and to hold the same as long as she may live. Third. After the death of my said wife, to be divided as follows, to wit: To my son Jonathan Heywood, the sum of (\$100.00) one hundred dollars. To my son Joseph Heywood, the undivided one-half of the 240-acre tract in section 14, township 19, range 5, Dodge Co., Nebraska. To my son Thomas Heywood, the undivided one-half of the 240-acre tract of land in section 14, township 19, range 5, Dodge county, Nebraska. To my son Barney Heywood, the southeast quarter S. E. $\frac{1}{4}$ sec. 10, township 19, range 6. To my son Edward Heywood, the east half of southwest quarter of section 10, and the east half of the northwest quarter of section 15, all in township 19, range 6, Dodge county, Neb. To my son Nick Heywood, the east half of the northwest quarter section 10, township 19, range 6, and the south half of the southwest quarter of the southwest quarter of section 15, township 18, range 6,

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Dodge county, Neb. Fourth. Each one of my sons is to pay whatever incumbrance there may be against the tract of land he is to receive. Fifth. To my daughter Annie Metschke, the sum of five hundred dollars (\$500.00) shall be paid. Sixth. I direct that all personal property remaining after the death of my said wife, shall be sold, and from the proceeds the bequests heretofore named, to my son Jonathan Heywood and my daughter Annie Metschke, as well as all other debts shall be paid, and should anything remain, same shall be divided share and share alike amongst my seven children or their heirs."

It will be seen that there is no mention in the will of the 80-acre tract of land in section 13 above mentioned. The evidence shows that the testator at the time of making the will was the owner of the 80-acre tract above described, and that it was a part of his farm "in Pleasant Valley township." He owned a 240-acre farm in township 19 north of range 5 east, and that was his farm "in Pleasant Valley township." The two sons, Thomas and Joseph, were in possession of this 240-acre tract and were farming it together. The three 80-acre tracts joined, and together made the one body of land. The witness who drafted the will testified that he made a rough draft of the proposed will according to the wishes of the testator, and then from that draft prepared the will itself. This witness testified that the testator stated to him that he wished to give to his sons, Joseph and Thomas, "the land in Pleasant Valley township." They were to have 240 acres of land in that township, each to receive an undivided one-half. The record shows that the testator only owned in township 19 of range 5 the 240 acres of land above described. There is uncertainty because the 80-acre tract is omitted from the will. The testator owned only one farm in "Pleasant Valley" township, and that farm was occupied by the two sons mentioned. The parol evidence would seem to remove all uncertainty concerning the intention of the testator. His purpose was to give the two sons mentioned the land in "Pleasant Valley," subject to the rights of the widow, Katherine Heywood.

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The case of *Lomax v. Lomax*, 218 Ill. 629, 6 L. R. A. n. s. 942, cited in appellant's brief, would not seem to be in point, because the testator in that case owned many tracts of land, some of which he did not include in the will or attempt to devise. "It is a rule, in construing deeds or wills, that the intention of the grantor or testator, as manifested by the words of the writing in connection with surrounding circumstances, must be carried into effect, provided in so doing no rule of law is violated or sound policy disturbed." *Pool v. Blakie*, 53 Ill. 495. This rule was adopted by this court in *McCulloch v. Valentine*, 24 Neb. 215, and in *Lesieur v. Sipherd*, 84 Neb. 296. The language used in the syllabus in *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, is: "The provisions of a will, like all other contracts, must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, it will not be declared invalid." In *Daugherty v. Rogers*, 119 Ind. 254, 3 L. R. A. 847, the will contained: "I will, devise and bequeath to Philo Rogers, the young man I raised, in addition to what I have already given him, the further sum of \$500." At the time this will was executed the testator held six notes against the legatee named, calling in the aggregate for the payment of \$6,000. Suit was brought on the notes by the administrator. In the opinion rendered the court quotes the maxim of Lord Bacon concerning what he defined to be an ambiguity: "That which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." The court also cites *Hawkins v. Garland's Adm'r*, 76 Va. 149, 44 Am. Rep. 158. In discussing the matter of ambiguity the Indiana court said: "Whenever, therefore, in applying a will to the objects or subjects therein referred to, extrinsic facts appear which produce or develop a latent ambiguity, not apparent upon the face of the will itself, since the ambiguity is disclosed by the introduction of extrinsic

facts, the court may inquire into every other material extrinsic fact or circumstance to which the will certainly refers, as well as to the relation occupied by the testator to those facts, to the end that a correct interpretation of the language actually employed by the testator in his will be arrived at." In stating affirmatively the purpose for which extrinsic evidence may be admitted, the court say it is "to connect the instrument with the extrinsic facts therein referred to, and to place the court, as nearly as may be, in the situation occupied by the testator, so that his intention may be determined from the language of the instrument, as it is explained by the extrinsic facts and circumstances. *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328, 336, and cases cited." A large number of American and English cases are referred to in the opinion. The court continues: "Thus, where a devise was to the children of the testator, upon inquiry it was discovered that he had no children, but there were other persons concerning whom he had always, or habitually, spoken as his children, and it was held that they were the persons intended. This brings us to a point where the general principles above stated may be applied to the case under consideration. Looking at the will, it is at once apparent that the object of the testator's bounty, so far as the subjects herein involved are concerned, is the young man he had raised; that primarily the subject of disposition was the further sum of \$500, and that the intention of the testator respecting the object and subject was, that the young man he had raised should receive a legacy of \$500, in addition to what he had heretofore given him." It was held that the administrator could not recover, and that the purpose of the devise was to give the devisee the \$6,000 included in the notes. The doctrine laid down in the cases above cited is sustained by *Wootton v. Redd's Ex'r*, 53 Va. 196. It seems reasonable, and sustains the lower court.

The judgment of the district court for Dodge county is

AFFIRMED.

ROSE and SEDGWICK, JJ., concur in the result affirming the judgment of the district court.

LULA BOXA, APPELLANT, v. GEORGE BOXA, APPELLEE.

FILED SEPTEMBER 28, 1912. No. 17,010.

1. **DIVORCE: EVIDENCE.** The evidence examined, and is *held* to justify a decree of divorce upon the grounds of extreme cruelty and habitual drunkenness.
2. ———: **CUSTODY OF CHILDREN.** It is also *held* that the plaintiff is the only proper custodian of the two children who at the time of the trial were one and three years old, respectively.
3. ———: **ALIMONY.** Where the situation of the parties and the possible contingencies are such that the amount of alimony to be paid cannot be placed in a lump sum without danger of hardship to the defendant, and uncertainty as to the plaintiff, the court should provide for the payment of a stated sum of money to be divided and distributed over fixed periods of time.

APPEAL from the district court for Saline county:
LESLIE G. HURD, JUDGE. *Affirmed as modified.*

Brown & Venrick, for appellant.

B. F. Good, E. E. Placek, Charles H. Sloan, Frank W. Sloan and J. J. Burke, contra.

HAMER, J.

Lula Boxa brought an action against George Boxa in the district court for Saline county praying a divorce from the bonds of matrimony on the grounds of extreme cruelty and habitual drunkenness. She also asked for the custody of the minor children born of the marriage, and an allowance for the maintenance of the children, and alimony and attorneys' fees. The husband, Boxa, denied the allegations made by his wife, and asked for a restoration of his

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family relations. There was a reply filed to the answer, and upon the trial the court found generally for the plaintiff upon the allegation of habitual drunkenness, and entered a decree granting the divorce as prayed, awarding the custody of one child to plaintiff and one to defendant, giving plaintiff judgment for \$700 alimony, \$300 attorneys' fees, and directing the defendant to pay \$200 per annum for support of Julia Boxa, the minor child awarded the plaintiff, until the amount paid should amount to \$2,000, upon condition that the child lives and plaintiff keeps the custody thereof.

An appeal is taken by the plaintiff upon the grounds: (1) That the custody of both children should have been awarded to her; and (2) that she should have been awarded a greater sum as alimony and for maintenance of the children. The children are two little girls. At the time of the trial one was three years old and the other was one year old. The custody of the elder child was awarded to the defendant, and the custody of the younger was awarded to the plaintiff.

In the determination of questions touching the custody of a minor child, the policy of our law is to make such a disposition of the child as is for the child's best interest, with due regard to any superior legal right of custody supposed to exist in either parent. Comp. St. 1911, ch. 25, sec. 15; *Sturtevant v. State*, 15 Neb. 459; *Giles v. Giles*, 30 Neb. 624; *State v. Schroeder*, 37 Neb. 571; *In re Burdick*, 91 Neb. 639. There is no question of the fitness of the plaintiff for the custody of her children. The defendant himself testified that she was a good woman, and that she was conscientious in the performance of her duties.

The defendant is found by the court to be an habitual drunkard, and counsel for the defendant concede the correctness of the conclusion of the court in this particular upon the record. In addition, it appears that the defendant has been guilty of many acts of cruelty towards his wife, and he has been guilty of other acts which show that he is a man of vicious habits, and coarse and violent in his

nature. The exhibition of these habits and tendencies has been of frequent occurrence about the home. The evidence shows that he would go to town and get drunk, but he was not satisfied with that, he would come home and be drunk and abusive about the house. The plaintiff testified that her husband frequently struck her and abused her, and called her vile and vulgar names. He did not confine his drunkenness to occasional sprees, but at times he would get drunk every day and abuse his family every day. .

Under the circumstances, the best interest of the child awarded to the defendant would seem to demand that her custody be awarded to the plaintiff. The defendant is the owner of a farm of 240 acres, worth from \$17,600 to \$20,400, subject to an incumbrance of \$3,300. He also has considerable personal property, although the value of it is not in evidence. It is at least sufficient to enable the defendant to cultivate and care for his land. The court awarded the plaintiff \$700 alimony, and required the payment of \$300 for plaintiff's attorney fee and \$200 a year for maintenance of the child awarded to the plaintiff.

While no hard and fast rule can be laid down for computing the amount of alimony to be awarded, it is the endeavor of the court to award such an amount as is just and equitable, taking into consideration the duration of the married relation, the amount contributed by each party, the amount of the estate, and the earning capacity of the defendant. The defendant is a young man, strong and vigorous, and the possessor of a good farm of 240 acres, 80 acres of which farm was acquired during the existence of the marriage. Considering his years, his earning capacity, and the labor of his wife, the amount awarded seems to be insufficient. We therefore modify the decree by adding to the award to the plaintiff the custody of the child Helen, and the alimony to be paid by the defendant to the plaintiff is increased to \$3,500, of which there shall be payable January 1, 1913, \$1,200, payable January 1, 1914, \$1,200, and payable January 1, 1915, \$1,100, and in addition the defendant shall pay to the plaintiff for the maintenance of

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the children \$300 a year during their minority, beginning on the 1st day of June, 1913, and, as modified, the decree is affirmed.

AFFIRMED AS MODIFIED.

**FREDERICK GEORGE, APPELLEE, v. MARY PRACHEIL ET AL.,
APPELLEES; JOSEPH VRBSKY, APPELLANT.**

FILED SEPTEMBER 28, 1912. No. 17,033.

Judicial Sales: SALE BY REFEREE: COMPLETION OF BID. Where a bidder at a referee's sale, shortly before the sale was closed, claimed that a railroad company owned and occupied a right of way across the tract offered which reduced the number of acres to be conveyed, and so should reduce the aggregate of the sum to be paid; *held*, (1) under the evidence, that the alleged ownership and the occupation of such right of way strip by the railroad company constituted merely an easement likely to be divested under the terms of the deed if it abandoned the road or changed its track therefrom, and that the court authorized the sale of the tract as a whole, and that the purchaser could not impose terms upon the referee or make a bargain with him unauthorized by the court; (2) that, the court having authorized the sale of the tract as a whole, the purchaser took such rights only as the referee could convey to him, which included the whole tract, subject to the easement of the railroad company; (3) that a bid at a referee's sale is only a proposal to buy, which may be withdrawn by the bidder at any time before the crier signifies his acceptance thereof (*Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281), but, appellant's bid in this case having been accepted without any intimation of withdrawal, he is liable at the rate per acre bid by him for the entire 80-acre tract offered for sale by the referee.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Bartos & Bartos, for appellant.

J. G. Beeler, contra.

HAMER, J.

Joseph Vrbsky was the purchaser at a referee's sale of the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 34. in township 7 north, of range 4 east of the 6th P. M., in Saline county. At a hearing in the district court for Lincoln county an order was made that the purchaser, Vrbsky, pay to the referee \$524.60 as a balance of the purchase price of a tract of 80 acres of land sold at a public sale held by a referee under an order of the district court for Lincoln county. The court found: "That said land was offered in a tract of 80 acres. * * * That said Joseph Vrbsky offered therefor \$86 per acre for the tract, and that his bid was accepted; that just prior to the time that his bid was accepted, and just before the sale was closed, a question was raised by said bidder as to whether said tract contained 80 acres, and it was claimed that the railroad had a deed for 6.10 acres through said tract; that after some negotiations between the parties, some understanding was arrived at, upon which the evidence is conflicting, the referee claiming that said Joseph Vrbsky was to pay \$86 per acre for 80 acres, and said Joseph Vrbsky claiming *that the court should determine the title by which the railroad sold its strip through said premises.*" The court then found that the deed to the railroad company contains language as follows: "Do hereby grant and convey unto the said railroad company and to their successors and assigns forever the following piece or parcel of land, situate in the county of Saline, state of Nebraska, to wit: A strip of land through the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) and the southeast quarter (S. E. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$) of section thirty-four (34), in township seven (7) north, of range four (4) east, according to the survey and located line of said railroad company, one hundred (100) feet in width, being fifty (50) feet on either side of the center line of the road of said company as located or to be

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located by the engineer of the said railroad company for the construction of the same from the city of Omaha, in Douglas county, in said state; to such point as may be herein designated, to have and to hold the same unto the said railroad company and to their successors and assigns forever, provided that in case said railroad company do not construct their road through said tract, or shall after construction permanently abandon the route through said tract of land, then the same shall revert to and become reinvested in the said grantors, heirs and assigns." It is further found that Vrbsky paid to the referee on the day of sale \$1,061.65, and that he has since paid \$5,293.75, making a total of \$6,355.40, and that these payments were made with the knowledge upon the part of the said Vrbsky that the said railroad crossed said land, and with the knowledge of the provisions of said deed. The court further found that the said railroad company took only an easement in the land occupied by its railroad, and that the intention of the grantors and of the grantee, the Omaha & Northwestern Railroad Company, was that only an easement should be created by the deed, and that such easement should be used for the construction of this line of railroad through said lands, and should revert to the said grantors, their heirs and assigns, if said railroad company did not construct their road through said tract, or should after construction permanently abandon the road. The court then found it unnecessary to pass upon the question as to just what arrangements were made between the referee and said Vrbsky, as the above finding of the court as to the said strip of land through said described premises being an easement made said Vrbsky liable for the payment of \$86 per acre, making the total sum to be paid \$6,880, upon which said Vrbsky had paid \$6,355.40, leaving a balance unpaid of \$524.60. The court then adjudged that said Vrbsky pay to the referee the said remainder unpaid, with interest at 7 per cent., and that the referee deliver to him upon such payment a deed for the premises.

This case is an appeal from this order of the district court. There is no notice to be taken of the original partition suit, and there is no question of the regularity of the proceedings in any way. There is only the question as to whether the purchaser shall pay for the 6.10 acres of land occupied by the railroad track. It is said in appellant's brief that "it must be conceded, we think, that if said deed is merely an easement, then the appellant herein, being charged, as the court has found, with notice thereof, must fail in his appeal." Counsel cite numerous cases showing that the violation by the grantee of a condition touching forfeiture causes the land to revert to the original grantor or his heirs. The court will look at the entire deed for the purpose of ascertaining what the grantor and grantee intended. The use of the word "forever" in connection with the provision that, if the railroad company did not construct its line through the tract and should abandon its route, then the same shall revert to and become reinvested in the grantors and their heirs and assigns, is not inconsistent with the purchaser's contention that the grantor permanently disposed of his interest. The intention of the grantor and grantee would seem to be that if the road is not built the title shall revert, or if it is abandoned then the title shall revert. The conveyance is apparently for the purpose only of enabling the road to occupy the strip for right of way alone, and that can give no more than an easement. It is beyond the power of the purchaser to compel the court to try title to the land purchased by him before he buys and pays for it. The purchaser can only take such title as the referee has to give him, and only so much land as the referee has to sell, and when the referee sold the tract described he did not warrant title to the strip. - It was the duty of the referee to sell that strip along with the other land included in the government subdivisions which he was selling. A sale made by a referee is a sale by the court. It is analogous to a sale made under the direction of the court in a case of mortgage foreclosure under order of sale, or a sale of

real estate under an execution. The action of the referee or of the sheriff or other administrative officer of the court is simply a sale of what there is to offer, and no more and no less. We do not believe that the purchaser may impose terms or conditions of any kind upon the referee or the sheriff or other person authorized to conduct the sale. If so, then the purchaser can substitute the condition of his bid for the conditions of the decree.

In the case of the *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281, it was held (a) that a judicial sale must be made in accordance with the decree of the court, and its terms cannot be changed by agreement of parties or counsel not incorporated into the record; and (b) the officer conducting the sale is not required to entertain any bids coupled with conditions not in conformity with the terms of the decree. In that case there was a proposed purchaser bidding more than the purchaser who obtained for itself the order of confirmation, but if the bid was higher it was "subject to all prior liens except \$1,568.70." In that case it was the contention of the agent of the purchaser that the decree in the case was rendered in pursuance of a stipulation which was entered into to the effect that the trust company creditor would be satisfied with the collection of the \$1,568.70. It was the contention of the debtor, the Nebraska Land, Stock Growing & Investment Company, that upon the payment of this \$1,568.70 it was entitled to have the decree set aside, and the bids of the proposed purchaser, or at least some of them, were made with that purpose in view. The affidavits on file in that case are said by the opinion to show that the condition attached to the bids of the prospective purchaser was for the purpose of enforcing the understanding had between the Nebraska Land, Stock Growing & Investment Company and the creditor, the Nebraska Loan & Trust Company. In that case Commissioner IRVINE, delivering the opinion of this court, cited *Swope v. Ardery*, 5 Ind. 213, to the effect that the bid was wholly inadmissible, and, also, *Moore v. Owsley*, 37 Tex. 603, where it was held:

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"We understand the law governing sales at public auction to be, where the sale is advertised to be on specific and restricted terms, any bid made at that sale not in strict conformity with the terms advertised is no bid at all, and the crier is not bound to notice the same."

Counsel for appellant say in their brief: "The court held that the said condition in said deed was in law a condition subsequent, and that the failure on the part of the railroad company to comply therewith operated as a forfeiture of the estate conveyed." *Hamel v. Minneapolis, St. P. & S. S. M. R. Co.*, 97 Minn. 334; *Jetter v. Lyon*, 70 Neb. 429; *Louisville & N. R. Co. v. Corington*, 65 Ky. 526. An examination of these authorities seems to justify the conclusion reached by counsel. This conclusion, fully expressed, would seem to be that whatever title, right or interest in the land has been conveyed to the railroad company reverts to the original grantor, his heirs or assigns, if there is a forfeiture depending upon the condition of the deed being broken, and the same is broken.

In *Hamel v. Minneapolis, St. P. & S. S. M. R. Co.*, *supra*, the plaintiff had conveyed a strip of land for right of way purposes across his farm and two strips adjoining thereto, one on the north and one on the south, for yard and station purposes to the Minneapolis & Pacific Railway Company, subject to all the rights and liabilities to which the defendant had succeeded. The consideration for the conveyance was: "If said second and third strips shall not be used for station purposes for the period of one year at any one time, the same and said first strip shall revert to and revert in the the party of the first part." *Held*, (a) that the condition was in law a condition subsequent, and that a failure on the part of the railroad company to comply therewith operated as a forfeiture of the estate conveyed; (b) that the words 'station purposes,' as used in the contract, were intended by the parties to mean to refer to a regularly operated railroad station, at which business might be conducted with the railroad company as at its other stations; and (c) that, as defendant has

failed to comply with the conditions by maintaining such a station, title to the property in question reverted to plaintiff."

In *Jetter v. Lyon, supra*, it was held: "A condition in a deed conveying real estate, by which it is provided 'that no malt, spirituous or vinous liquors shall be kept or disposed of on the premises conveyed, and that any violation of this condition, either by the grantee or any person claiming rights under him or her, shall render the conveyance void, and cause the premises to revert to the grantors, his heirs and assigns,' is a valid condition subsequent which, until broken, runs with the land. On a breach of such condition the grantor, if living, or, if dead, his heirs, may claim a reversion of the estate and can maintain an action in ejectment to recover it." The opinion in that case was delivered by Judge BARNES who was then one of the commissioners. It is said on page 433 of the opinion: "The provisions of the deeds in question constituted a condition subsequent. The title to the property vested in the several grantees, and, finally, in Jetter, conditionally, to be divested on his failure to comply with the conditions by which it was provided that he should hold it. * * * The condition was a valid one, and in all of the adjudicated cases has been held to be a condition subsequent which runs with the land, until broken." Numerous authorities are cited, including, among others, *Smith v. Smith*, 64 Neb. 563. It is further said in the opinion: "The provisions of the deed seem plain to us, beyond all question. There can be no doubt as to what was intended by the parties thereto. And, while its language clearly shows it was intended that Ramey should be bound by a personal covenant never to sell, or permit to be sold, intoxicating liquors on the premises, yet, it still more clearly shows it was further intended that the estate in the premises should be conveyed merely upon the condition that neither Ramey, nor any one holding under him, should ever do any act prohibited by the covenant. * * * We hold that, by the language contained in the deed from Lyon to

Ramey, a valid condition subsequent was created upon the continued observance of which, by the grantee and those claiming under him, the estate conveyed to them depended; and that, whenever either of them committed a breach of the conditions, the grantor, if living, or, if dead, his heirs were at liberty to claim the estate and could maintain a suit in ejectment to recover it."

In *Louisville & N. R. Co. v. Covington*, *supra*, the Louisville and Nashville road had come into possession of the Portage railroad company and all its rights of way by purchase. It took up part of the track and ceased to use a certain other part. In a suit brought by the heirs for the entire right of way conveyed by E. M. Covington, alleging that the right of way had been abandoned and that the Louisville and Nashville road had no right to purchase or hold any part of it, *held* "that the law imposed the additional condition upon the conveyance that the right of way should continue to be used for the purposes contemplated, and that a reversion would result from abandonment or nonuser; that, as to that part of the right of way from Adams street to the town terminus, the abandonment was complete, and plaintiffs were entitled to recover it, but, as to the remainder of the right of way, which has continued to be, and is still, used for a railway, as contemplated in the conveyance, there is no forfeiture or abandonment."

"A partition sale is a judicial sale." *Kazebeer v. Nunemaker*, 82 Neb. 732.

"All sales made by order or decree under the direction of the court and requiring confirmation by the court are judicial sales." *Kazebeer v. Nunemaker*, 82 Neb. 732. "The purchaser at a judicial sale upon the foreclosure of a mortgage upon confirmation acquires the title of all the parties to the action, and nothing more." *Kerr v. McCreary*, 84 Neb. 315. It is not the land itself that is sold at the judicial sale, but only the interests of the parties to the suit. *Currier v. Teske*, 84 Neb. 60. At the foreclosure sale the bidder was John Campbell, the owner of

the mortgage deed and the plaintiff in that action, and the sale was confirmed "to the purchaser, John Campbell. * * *. The sheriff's deed recites that Schmideke was the purchaser at the sale. Under these circumstances, after the lapse of so many years, and considering that Campbell never made any claim that the deed was void, and through his agent accepted and retained the purchase money and caused the deed to be executed to Schmideke, it will be considered that he became by equitable assignment the owner of Campbell's interest in the bid, that the deed was made pursuant to such assignment, and that he thereby became vested with all interests that Campbell then had. The purchaser at a foreclosure sale buys all the interests of all the parties to the suit. Code, sec. 853; *Young v. Brand*, 15 Neb. 601; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276; *Buchanan v. Griggs*, 18 Neb. 121. That which was sold, therefore, was the life estate of Eugene Currier and Campbell's unforeclosed mortgage on the plaintiff's equity of redemption. At the sale the interest of the defendant sold for \$500, while the amount of the decree was \$367.87. The proceeds of the defendant's interest, therefore, paid the mortgage debt and extinguished the lien on plaintiff's equity of redemption. So that, when Campbell sold to Schmideke, he sold the life estate which he had foreclosed upon and purchased, and that alone. * * *

The defendants assert that it was 'the land itself' that was sold, and not the life estate, but this cannot be true. The interests alone of the parties to the suit were sold. To hold otherwise would be to deprive one of property without due process of law. The purchaser at a foreclosure sale must advise himself of the title he buys, and when the real owner of the fee is not made a party he cannot deprive him of any of his rights by the purchase." "A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all the parties to the action." *Arterburn v. Beard*, 86 Neb. 733. The bid only amounts to a proposal to buy, and until the crier of the

sale, by the fall of the hammer or other recognized act of acceptance, signifies assent to the proposal there is no contract, and the proposal may be withdrawn. *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 281; *Fisher v. Seltzer*, 23 Pa. St. 308; *Blossom v. Railroad Co.*, 3 Wall. (U. S.) 196; *Payne v. Cave*, 3 T. R. (Eng.) 148. Before the purchaser paid any money he knew what the facts were. He knew that the railroad occupied the strip. He therefore bought with his eyes open. It was his business to see what his legal rights were before he paid any money down on the purchase. In *Fisher v. Seltzer*, *supra*, it was said: "The brief interval between the bid and its acceptance is the reasonable time which the law allows for inquiry, consideration, correction of mistakes, and retraction. This privilege is of vital importance in sheriff's sales, where the rule of *caveat emptor* operates with all its vigor."

Under the evidence and the authorities cited, we conclude, first, that the whole tract of land offered, being 80 acres and including the strip of land across it occupied by the railroad company as its right of way, was included in the sale, and that the alleged ownership of the railroad company and its occupation of the right of way constituted merely an easement, likely to be divested if the railroad company abandoned its road or changed its track therefrom; second, that the purchaser could not impose terms upon the referee or make a bargain with him which was unauthorized by the court; that the court authorized the sale of the 80-acre tract as a whole, including the right of way of the railroad company, and that the purchaser took such rights only to the land as the referee had and could convey to him under the order of the court; third, that the bidder was not obliged to take the land because of his bid, and that the bid only amounted to a proposal to buy which might be withdrawn at any time until the crier signified his assent to the proposal, but as he did not withdraw his bid, and the same having been accepted without any intimation of withdrawal, appellant is liable at the rate per acre (\$86) bid by him for the entire 80-acre tract offered for sale by the referee, including the right of way.

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The judgment of the district court is sustained by the evidence and the decisions of this court, and it is

AFFIRMED.

ROSE, J.

I concur in affirmance.

SEDGWICK, J.

I concur in the result affirming the judgment.

**KATE M. HOLLADAY, APPELLANT, V. WILLIAM HENRY RICH
ET AL., APPELLEES.**

FILED SEPTEMBER 28, 1912. No. 17,047.

1. **Deeds: EQUITABLE TITLE.** Where the plaintiff was the daughter of the decedent, and became possessed of \$300 by devise, and gave the same to her father toward his support, and also turned over to him her earnings during many years as a teacher, for the same purpose, and after her marriage she became, by a conveyance from her husband, the owner of certain village lots, and sold the same for \$500, and her father collected the money and retained it in his possession by her consent, except \$125, and the daughter also became the owner of 320 acres of land by a gift from her husband, and the father was permitted by the daughter to collect the rents from the same, and the money collected as rent and that reserved from the sale of the lots was used by the father, with the daughter's consent, in paying off a mortgage upon the farm occupied by the father, and the plaintiff, with her husband's assistance, further helped the father by paying taxes on the said farm, and also continued to contribute to her father's support, and prior to and during the time the said money was being so furnished and so used the father promised to convey the farm to the daughter, without other consideration than that he had received from the daughter, and made improvements upon the farm, saying that the farm was for the daughter and that the improvements were made for her, and he also joined her name with his as lessor of the farm in making yearly leases to the farm tenant who cultivated the same in crops, and the father also conveyed the land (his wife joining

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him) to the daughter by an absolute deed of conveyance, and the deed was delivered to her, although subsequently returned to the father for correction, and was then not returned to the daughter, it will be *held*, in a suit by the daughter to quiet title to the premises in herself, that she had, at the time that the deed was so returned to her father and kept by him, an equitable claim against the said premises and an inchoate title thereto which might be enforced against the father and his grantees with notice of the daughter's rights.

2. **Mortgages: VALIDITY.** And where, upon the death of the decedent's first wife, who was the mother of the plaintiff, and who joined with the decedent in the execution and delivery of said deed to the daughter, and who had joined with the father in the promise to convey to the daughter, the father married a second wife, and the father, while in ill health, being much enfeebled in body and mind and apparently addicted to the use of opiates and apparently having only a short time to live, being about 80 years old, was induced by the second wife, who was to be in part benefited thereby, and one M. B. K., who was a traveling preacher, to execute and deliver to one Rich a conveyance absolute to said farm, under an arrangement whereby said Rich was to make certain notes and a mortgage upon the farm, amounting to \$7,000, being the full purchase price thereof as agreed, and then the notes and mortgage were to be delivered to a college in Wisconsin which was being conducted under the auspices of a church association to which the said traveling preacher belonged, and without other consideration than the promise in writing upon the part of the college to pay to the father during his life the interest as it fell due according to the notes given, and after his death to the widow until her decease, and then the notes and mortgage were to be the exclusive property of the college, and this arrangement was consummated and the deed was made to Rich by the father and his wife, the plaintiff's stepmother, and the notes and mortgage were duly executed by Rich to the father, and were then delivered by the father to M. B. K., the traveling preacher, and then were turned over to the college by the preacher, it will be *held*, first, that the notes and mortgage were obtained by undue influence of the wife and M. B. K. upon the father of the plaintiff, and that the college received them without paying any valid consideration therefor; and it further appearing that the wife and M. B. K. knew of the daughter's interest in the premises, *held*, that the college could not be, and was not, an innocent holder of the notes and mortgage, and that the legal title to the premises was held by the defendant Rich in trust for the plaintiff, and that the notes and mortgage held by the college were held in trust for the plaintiff, and that the

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deed, notes and mortgage should be canceled and title to the premises quieted in the plaintiff.

3. **Quieting Title: EVIDENCE.** An examination of the evidence discloses that, after the making and delivery to the daughter of the deed for the premises above set forth, the father sent for the deed, representing that he wished to correct it, and when the deed was returned to him he retained it, and it was subsequently arranged between the father and the daughter that the daughter should come upon the premises and occupy the same as a home for herself and her husband and children, providing for the father and his wife, the stepmother, and the daughter then came from Kansas City, where she resided, to her father's house, and was then ready to occupy the premises and to proceed with the agreement, and when she did so the father then claimed that he had rented the land to said Rich the day before, and seemed unwilling just then to proceed with the agreement; that the evidence shows an attempted evasion of the terms of the contract induced by the undue influence of the plaintiff's stepmother and others who were seeking to procure a gift of the property or its value to the college in question.

APPEAL from the district court for Valley county:
JAMES N. PAUL, JUDGE. *Reversed, and decree entered.*

E. J. Babcock, A. Norman and O. A. Abbott, for appellant.

Clements Bros., E. J. Clements, R. L. Staple and Ray W. Clark, contra.

HAMER, J.

This is an appeal from a judgment of the district court for Valley county dismissing the petition of the plaintiff, who brought her bill in equity to quiet title to the northwest quarter of section 33, in township 18 north, of range 13 west of the 6th P. M., in Valley county, Nebraska, alleging that she was the daughter of Charles Badger, deceased, and that he had died in December, 1906, and that at the time of his death Mary B. S. Badger was his surviving widow, and that Milton College of Milton, Wisconsin, was a corporation organized under the laws of the state of

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Wisconsin; that while she was a member of her father's family she became possessed of the sum of \$300 by devise, and that she gave this money to her father; that she was a teacher, and that she also turned over her earnings as a teacher to her father, and that after her marriage she and her husband both contributed to the support and maintenance of the father; that they assisted him in paying his taxes, debts, and otherwise; that the plaintiff was the owner of 320 acres of land in Valley county, and that she permitted the use of this land to her father for a number of years, and allowed him to retain all the receipts therefrom; that she also owned lots 3, 4, 5 and 6, in block 23, in an addition to the village of North Loup, in Valley county; that the plaintiff became the owner of this property by a conveyance made to her by her husband; that she sold the lots above mentioned for the sum of 500, and that her father collected the money, and gave her the sum of \$125 out of the \$500, and she permitted him to retain the remainder; that the remaining sum of \$375 retained by her father was used in the payment of a mortgage upon the said northwest quarter of section 33, township 18 north, of range 13 west of the 6th P. M., in Valley county, Nebraska, being the land in controversy in this action; that title to said land last above described was by said decree of the district court for Valley county quieted in the defendant William Henry Rich, subject to the lien of the mortgage hereinafter described and held by the defendant Milton College, and which decree quieted and confirmed the title of said Milton College in the said mortgage and the notes which it secured, being the notes made by William Henry Rich to Charles Badger, and by said Charles Badger transferred to the said defendant Milton College.

The father was a doctor on the frontier, and he seems to have always been in poor financial circumstances. After the plaintiff's marriage, she and her husband went to Kansas City to live, but they made frequent trips to Nebraska, and were not unmindful of the father. They helped him pay his debts, and they helped him to live, and seem

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to have been devoted and loyal. There seems to have been an unwritten agreement between the father and daughter by which he was to have the use of the 320 acres of land that belonged to the daughter, and he was to use the money realized from the use of this half section in paying off the mortgage on the land in controversy, and also toward his own support. About the year 1901 the father and the mother of the plaintiff executed a conveyance to her, but subsequently the father desired to have it returned to him so that he might put her husband's name in the deed, and she sent it to him, but he kept the deed and did not afterwards deliver it to her. There seems to have been no trouble of any kind until after the first wife of the deceased died. She was the mother of the plaintiff, and after the first wife died the deceased married the defendant Mary B. S. Badger about September, 1899. After the marriage of the deceased to the defendant Mary B. S. Badger, the plaintiff was induced to trade one of her tracts of land to the said Mary B. S. Badger for another tract of land of less value, and there seems to have been an understanding that she was to be recompensed for the difference in value, but this was not done. About April 13, 1905, the deceased, Charles Badger, and the defendant Mary B. S. Badger executed, acknowledged and delivered a deed to the defendant William Henry Rich for the said northwest quarter of section 33, and Rich executed and delivered to the said Charles Badger a mortgage upon the said land for \$7,000 securing notes of various size to that amount, the first due November 1, 1905, and the last due April 1, 1913, all notes bearing interest at the rate of 6 per cent. per annum. Rich paid no money and gave no consideration for the land except the notes and mortgage. The conveyance to Rich and the mortgage made by Rich to the deceased were executed and delivered in pursuance of an agreement for a gift to the defendant Milton College. Milton College seems to be an educational institution at Milton, Wisconsin, and is run under the auspices of the Seventh Day Adventists. It was one of their preachers

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who seems to have been active in procuring the gift to be made. He was temporarily stationed at that time at North Loup, and seems to have been a traveling evangelist. The defendant Mary B. S. Badger seems also to have been active in procuring this gift to be made, and the evidence would seem to show that she became a beneficiary at or about the same time the gift was made. She was ten years younger than her husband at the time the conveyance to Rich was made. The testimony discloses that the deceased at the time of the execution of the deed to Rich was quite feeble, and that he was infirm in mind and body, being unable much of the time to remember and recognize his neighbors whom he frequently met. He seems also to have been in the habit of taking a white powder, which may or may not have been morphine, but the testimony seems to indicate that it was. He was greatly addicted to the use of it. He died within about 18 months after the execution and delivery of the deed to Rich. It was apparent at the time that he executed the deed that he did not have long to live. Of course, the traveling preacher who received the mortgage and notes made by Rich was aware of that fact when he received them and sent them to Milton College. Milton College agreed to pay interest on the notes to the time of the death of the deceased, and after that to his widow until her decease. Of course, if Rich paid the interest to the college, then the college would not be out any money. It was a gift to the college. In his testimony M. B. Kelly, the traveling preacher, testified: "I had something to do with it between the college and the doctor." He says: "He asked me to do the writing for him, which I agreed to do, as corresponding worried him." He says of himself that he resided at Milton for two years. "I was an evangelist, a traveling preacher of the gospel, holding revival meetings." He testified that his headquarters were at Milton, but that he was not there much. The reasonable inference is that he was out traveling in his business as an evangelist. On cross-examination the preacher says of Badger's condition: "He was

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in what we would call in a decrepitude of age." He says that he (Kelly) wrote to the president of Milton College, but, with an appearance of being disinterested, he says: "I am not sure it was *before or after* deed was made." He also says: "I don't remember whether I asked the president to write him. *Possibly I may have in regard to this business*, I don't remember any such thing in the correspondence, deed, the notes, and mortgage made at the same time." Again he says: "This correspondence with Milton College in reference to acceptance of this donation and what they would do *nearly all transpired through me*. I am rather of the opinion the doctor wrote some letters himself. I am not sure. He told me he contemplated writing, or had written, or something to that effect. The agreement was sent to me, and I handed it to the doctor. I think I forwarded the notes and mortgage *as a matter of correspondence*. I am not sure." The two letters of the evangelist to the president of the college read like songs of triumph: "I have the pleasure of sending you in this mail the mortgage and notes for \$8,000 assigned this day to Milton College by Dr. Charles Badger and Mary B. S. Badger, his wife. You will doubtless be agreeably surprised to find it \$8,000 instead of \$5,000. But the more they thought it over the more they felt they should give their means to Milton College, so here it is. * * * I hope the contract to be executed and returned by you will be attended to very promptly as the doctor will not rest easily until the last thing is attended to. It has been a great anxiety upon his mind of late, and in his declining health he should be freed from all such anxiety." May 22, 1905, three days before sending the letter to the president from which the foregoing excerpts are made, the preacher wrote him a letter from which the following is taken: "I have the honor to tell you that, after reading your letter to Dr. and Mrs. Badger and talking the matter over with them, they readily accepted your suggestion, and expect this week to make a direct transfer of five of the one-thousand dollar notes to Milton College with the

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understanding that the trustees are to execute an agreement to pay him six per cent. interest on the same till his death, and afterwards to Mrs. Badger (should she survive him) as long as she lives. * * * Had your first letter reached Dr. Badger a few days sooner, Milton College would have received the entire \$8,000. * * * Hoping this will all be satisfactory to you and rejoicing in the privilege of *bearing even a small part* in this worthy transaction, I remain, very sincerely yours, M. B. Kelly."

The president of the college testified that he had seen the doctor at North Loup in 1904, and that he first learned of the doctor's intentions in the spring of 1905 *through a letter written by his pastor, Rev. M. B. Kelly*. He also testified, in substance, that he was *relying upon Kelly to carry the negotiations through*. "Q. Well, then you relied on Mr. Kelly to see that the transaction was carried through? A. Certainly in that sense I did." The defendant, Mary B. S. Badger, testified that she was married to the doctor July 20, 1898, and lived with him 8 or 9 years. She had been at Milton, Wisconsin, she says, "visiting and doing business;" that she resided with the doctor the rest of the time. The deed made by Charles Badger and Mary B. S. Badger to William Henry Rich for the land in controversy is dated April 13, 1905. It is an ordinary warranty deed. It is acknowledged before R. L. Staple, notary public. The mortgage is for \$7,000, is of the same date, and was also acknowledged before R. L. Staple, notary public. The assignment of the mortgage and notes by Charles Badger to Milton College bears date May 25, 1905, and was acknowledged before R. L. Staple, notary public. All three of these instruments seem to have been executed in the presence of M. B. Kelly. The deed and mortgage were executed and witnessed in the presence of, and witnessed by, M. B. Kelly and Kate T. Kelly, while M. B. Kelly and R. L. Staple witnessed the assignment.

Mary B. S. Badger was interested in getting the property or its value into Milton College for the reason, first, that she would get interest on the value of the property

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from the college after the doctor's death. If the property had been transferred to the daughter, Mrs. Holladay, then Mary B. S. Badger would have received no benefit from it. The mother of the plaintiff, who was the first wife of Dr. Badger, died in June, 1897. The next year the doctor married the defendant Mary B. S. Badger. Milton College claims to be an innocent holder of the mortgage, but sets up a contract between Charles Badger and Mary B. S. Badger, of the one part, and the plaintiff and her husband, of the other part, by which the plaintiff and her husband agree to farm and manage in a workmanlike manner the land in question, and to pay all taxes and make all improvements, and to furnish said Badger and wife "all they may need for their home and support, also feed for one horse, one cow, one pig, and a few chickens on the above described farm." The instrument also provides that "at the death of the said Charles Badger and wife, Mary B. S. Badger, the said Kate M. Holladay and husband, William J. Holladay, shall come into full and immediate possession of said property; and this lease put on record shall be to the said Holladays a full and complete title to said property free and clear from all incumbrance of every form and kind." This instrument is dated August 8, 1902. On the 15th of June, 1903, William J. Holladay and Kate M. Holladay, his wife, seem to have executed a quitclaim deed to Charles Badger and Mary B. S. Badger by which they released the land from the foregoing contract. Milton College, by its president and secretary, executed an instrument by which it undertook to pay interest at 6 per cent. per annum on the \$7,000 Rich notes and mortgage.

An examination of the record discloses the fact that Milton College gave nothing for the \$7,000 mortgage and notes except a guaranty that the interest would be paid. Of course, if Rich paid the interest, the college would be out nothing. The college received the notes and mortgage and assignment under circumstances which were such as to compel it to take notice of the rights of the plaintiff.

The defendant William Henry Rich was not called, as a witness, but he knew Dr. Badger and the plaintiff, and he was farming the land, and undoubtedly knew the circumstances, and he so testifies in his deposition taken in support of the plaintiff's motion for a new trial: "Have lived in vicinity 12 years. Have been acquainted with Dr. Badger since I lived here—10 or 12 years, * * * I rented the place I live on now from the doctor one year before I bought it. I bought it April 5 next year after I rented it. Don't remember the year. Deed was delivered to me at Dr. Badger's house. I delivered to the doctor a mortgage same day. Mr. Staple was present and drew it up, and Dr. Badger and his wife, preacher Kelly and his wife, all there. *No money was paid by me at that time.* The deed was delivered to me, and he says, 'Take that deed and get it recorded as soon as you can.' Don't remember that anything was said at that time about a former deed to Kate M. Holladay. 'Well, he told me once that he gave them a deed and it wasn't just right and he wrote to have it sent back.' * * * Q. Did you see anything he claimed was the deed? A. Well, he had some papers there that day, I could not tell whether it was a deed or not. * * * Q. Did you know what he did with that deed that day? A. Well, I don't remember whether it was the deed, or what, but he had a handful of papers, and asked Mr. Staple if he would need those any more, and Mr. Staple said, 'I don't think so,' and he put them in the stove. I don't think he showed the papers to Mr. Staple at that time. I don't know, I don't think Mr. Staple examined them. I didn't hear any remarks at that time about Mrs. Holladay having failed to keep her engagements. Q. Did you ever hear any remark of that kind? A. Well, when they moved up to take possession of that land, they moved up in the fall before. At that time I was in possession of that farm. Yes, sir; I lived on it, and had it leased for that year, and a verbal contract for the next year, but no lease. Q. And a verbal agreement for the renting of it next year. and at the time this verbal agreement was made, was that

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the time he spoke about the deed? A. What deed? Q. The deed he sent for? A. Oh, no, no; he always spoke of the place when he spoke of the place as *Kate's place*. Q. How often did he speak of it as Kate's place? A. Oh, whenever he wanted to make a change or fix it up. Q. He then spoke of it as Kate's? A. Yes, sir. Q. Do you remember whether your lease was signed by him as agent, or by both their names? A. It was always signed by agent. Q. By him as agent? A. Yes, sir. * * * A. No, sir; I never saw this deed he spoke about. I don't remember that he told me it hadn't been recorded. No; I don't think he did. No; not to me he didn't say it was no good because it had not been recorded. I couldn't tell how long before the deed was made to me that he spoke about the deed and having gotten it to have changes made. I have no idea. No; he never told me what changes were to be made in it or why he had it sent back. Q. Did he have reference to that deed when he took those papers and put them in the stove? A. I couldn't say, but he made that remark that he didn't think he would have any more use for those papers and put them in the stove. * * * Q. And it was while you were in possession of it the second year? A. I had had my contract fixed up before that occurred. She came up here and wanted him to put me off so she could have it, and he said, 'Why, I have rented it for another year to Mr. Rich and I couldn't do that,' and I felt like I was in the soup until I got the contract renewed. Q. That was the verbal contract? A. No; we was to make out the contract later on, and I took the contract down and had it renewed, so he wouldn't change his mind. Q. Was she present when you talked with the doctor about getting possession of the property? A. No; I was down there one time, and I had a piece of fall wheat in, and they had notified me before, and I told them there was the pasture and I would like to keep that. Q. You mean what cultivated ground there was he wanted? A. Yes; there was 50 acres broke out, and I wanted to keep the pasture. No, sir; I never saw this deed he said he had. No, sir; I

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wouldn't know. I couldn't tell whether the paper he burned was a deed or mortgage. He had the lease and I had a copy. No; I couldn't say it was the lease he burned. Mr. Staple said he didn't think there was any use keeping them any more, and then he said to me, 'Be sure and have yours recorded right away.' No, sir; nothing said about a deed not being good unless it was recorded that I remember."

From the foregoing it would seem that, when Mrs. Holladay went up to North Loup to live on the land, she was ready to take possession, and her father was keeping her out of the possession, and this man Rich was helping him to do it. That the doctor intended the land for his daughter, the plaintiff, is shown by the testimony of many persons. Seventeen witnesses in varying phraseology testify that they heard the doctor say that the farm was for his daughter, Kate. He would say that whatever was done on the farm was done for Kate. He seems to have delighted to tell his neighbors about the farm that he intended it for his daughter.

Clement Meyers and his brothers had rented the farm in controversy from 1896 to 1902. The leases were signed Kate Holladay by himself. "Q. Had you any talk with him about this farm in connection with his daughter, Kate? A. He always said it was her farm. * * * When we were making the last contract, he reserved the stalks, said his daughter and Mr. Holladay were coming up, and he even reserved the straw. When they enlarged the cellar, he said they were making that improvement so that, when they came up, they could have a decent house (the Holladays). When we put on a windmill, Mr. Holladay was there at the time. He asked Mr. Holladay where he wanted the windmill. * * * Q. And when was it you heard the doctor say the Holladays were coming up to occupy the premises? A. I heard him say that a thousand times probably. Well, every time we had any conversation with him, he would say they was coming up, or that this is their house. Occurred all the years we occupied it." He says of the leases which he made with the doctor for th-

land that they made a new lease every year. "I think Kate M. Holladay and Dr. Badger's names signed to all of them."

Harry Meyers: "Yes; he always mentioned Kate Holladay in connection with the place. There was no one like her. We were on good terms most of the time. Yes; at the last. I took him some meat while he was sick abed. Well, he would lots of times mention that he was going to fix this for Kate; that they were coming pretty soon, and this and that, and everything that was done was for Kate. Well, I helped put down a foundation around the cellar, and it was fixed for the Holladays, and about fixing the windmill."

Lynn Holladay: His grandfather gave him the deed for the farm to take to his mother. At that time the doctor said: "This deed to my farm I want you to take to Katie so that when I am dead she will have it."

The witnesses for the defense do not deny the statements made by the witnesses for the plaintiff concerning the fact that the farm was Kate's farm, or was to be Kate's farm. They do not deny that the specific things were said to which the witnesses testify.

It is urged by the appellees that the husband of the plaintiff was disqualified to testify under section 329 of the code because he had a direct legal interest in the result. It is urged that the plaintiff's husband would be liable for the costs because he was once a party plaintiff in the action. It is hardly necessary to discuss this question, as the testimony of the other witnesses abundantly establishes the plaintiff's case.

William J. Holladay, in 1904, while his wife, the plaintiff, was up at North Loup visiting Dr. Badger, turned the 320-acre farm over to Everingim, the agent of his wife and himself. And the arrangement was made that the Holladays were to take charge of the quarter section in controversy that fall. The doctor had himself said that he was unable to attend to the farm any longer. Then Mrs. Kate Holladay, the plaintiff, went from Kansas City to

North Loup in August, 1904, to take possession of the farm in controversy, and when she got there she found out from her father that he had rented the land to the defendant Rich the day before she arrived. It seems that he did not then want her to have the land. Her daughter was with her, and they were ready to go on with the arrangement to take care of the old folks, but, as the land was rented to Rich and they could not get possession of it, they went back to Kansas City.

Dr. Badger's Condition.

Oscar Babcock saw him every day. He had a farm back of the doctor's house 8 or 10 rods. He worked every day. He testified that the doctor said he could not keep up without medicine; that the doctor said to him, "I can't leave it alone, I can't live without it." Said he used the purest article he could get, didn't buy it there in town. He said he could get a better article by sending away for it, and he said, 'I sent away a while ago,' to Chicago, I think, can't remember places, but he said he bought \$4 worth at one time, and he regretted that he had to use it. Said, 'I can't keep up without it.'"

H. A. Watts testified that he met him in 1905; after being away, and noticed that he had failed physically and mentally. "He was very childish when I was working for him. One day he would tell me how to do a thing, and in an hour say it would be some other way, and when he got through started right back and had to ask how to write my name. I would meet him on the street, and talk to him, and he would say, 'I don't know you,' and I would tell him, and he would say, 'By jolly, I didn't know you.'"

E. S. Sears testified: "When I first became acquainted with him, he was a remarkably bright and vigorous man, and the last few years he got very bad physically, and his mind got weak, of course. * * * In spite of the fact that we had been intimately acquainted for the past years, if I would meet him on the street and speak to him, he would say, 'I can't call your name,' and I would tell him who it was, and he wouldn't seem to be able to place me,

and the last year I didn't speak to him at all. * * * Toward the last the increase became very marked."

W. A. Prentice testified: "I passed the doctor and Mrs. Badger in the vestibule, and, as usual, reached out my hand. He barely touched it, looked up, saw who it was, and immediately jerked his hand away and went away. Nothing like that ever occurred before, not to my knowledge. Well, in connection with the same incident, just a few days after I met him on the street, and he failed to recognize me. I spoke. He made no reply. I stepped right in front of him, and said, 'Doctor, what is the matter, have I ever injured you in any way, shape, or manner? If I have, I don't know it.' He said, 'Only by inference, Mr. Prentice, only by inference.' I said, 'Doctor, if I have ever laid a straw in your way, I don't know it.' He reached out his hand, and said, 'If that is the way, everything is just like it was.' I noticed he was just breaking down physically and mentally. I am not a medical man. I have never seen him, to my knowledge, take any medicine in all the years I have known him, except I have seen him occasionally take a powder from his pocket and take it." This witness testified that the doctor wanted to trade him a farm worth \$2,000 for a little residence in the village worth, perhaps, \$450. He seems to have wanted to trade even. He says that he would have traded with the doctor only he didn't consider that he was competent to do business. "From my knowledge and observation of persons addicted to opium, it has always been my opinion that the doctor was addicted to opiates, and it has increased. From my observation and experience he was not capable of transacting business in 1905."

G. L. Larken was a plasterer and brick mason. "The doctor called me to tear down his chimney. He thought a brick had fallen in, and wanted me to tear down the chimney and get it out. I went out and looked at it. No brick had fallen from the top. Got down and looked inside, and didn't see anything, and didn't fix it. Well, sir, the reason why I didn't fix it was because I didn't think it

needed it, and one time when I was there he called me in, and his wife showed me the door, or he went in another room, and she said, 'I don't think it needs it, I wouldn't pay any more attention to it.' * * * I thought there was nothing the matter with it, and thought he was kind of childish about it."

E. J. Babcock: He knew that Dr. Badger was over 80 when he died. He visited the doctor. He told Babcock that he had given his library to a Dr. Wilson of North Loup, also that he wanted to give away his household goods and furniture because he would not need them much longer. He found him "growing old and getting exceedingly infirm, and about the time the first wife died he didn't know me. When I would tell him who I was, he would say, 'Ah, yes.' It kept getting a little more and a little more marked. I would see him generally when he was around doing chores. Sometimes he would seem more dazed than others. He would start to town so we all noticed it. There was a telephone pole there or a tree, and he would commence running as though he would fall and would catch hold of that. One time I started to catch him and help him, and a good many times he would not know me, and those times kept growing."

The witnesses for the defense concerning the condition of Dr. Badger do not deny that he was weak and feeble. They only failed to see evidence of the fact that he used opiates. He gave the evangelist preacher Kelly his horse and buggy. He afterwards took from Kelly a paper which was so intangible that Kelly does not remember whether it was a promise to pay money, and, if so, how much. He says of it: "This was a transaction I did not consider of great importance. It did not weigh heavy on my mind." In a letter dated March 3, 1904, Mrs. Mary B. S. Badger describes the doctor at that time as being very nervous, and very much worn out, and not fit to do any business, and so forgetful as to be unable to remember "while he is turning around." In that letter she says that he "cannot hold out many years longer." In another letter she de-

scribes the doctor as "not fit to do business of any kind," and also says: "I can see his memory fail every day. * * * There is no question but what his brain is bad, and heart also."

One of the witnesses for the defense in this case is Mr. Theodore L. Gardiner, whose deposition was taken. He is shown to have resided at North Loup from September, 1906, to August, 1907. He had been the pastor of the Seventh Day Baptist Church of North Loup. He was at one time president of Salem College. At the time he testified he was the editor of Sabbath Record. He testified to going to Ord, the county seat of Valley county, to get a deed which had been made to him in trust for Mary B. S. Badger, one of the defendants in this case. He describes the deed as a conveyance of the house the doctor lived in, and one-half the lot. He says: "The deed I referred to was made to me in trust for his wife's use while she lived, and at her death to sell it and pay Milton College \$1,000 out of the proceeds thereof." He testified: "The paper I went to the county seat for was the deed to me." He says of the deed it was a regular deed. The abstract of the evidence does not go fully into the details of this deed and the \$1,000, but there is a reference in the testimony of Albert Whitford, who describes himself as treasurer of Milton College at Milton, Wisconsin. He says in his evidence:

"I knew of the transaction between Dr. Badger and Milton College. The notes and mortgage assigned to the Milton College came to my hands. I have had them since. I have made payments to Dr. Badger as follows:

"Jan. 17, '06.....\$240	" \$210 on account of his mortgage, and \$30 on account of his wife, her mortgage for \$1,000.
"Apr. 2, '06.....\$240	
"Apr. 22, '06.....\$240	

"(Receipts are shown on Bill Ex., page 348.)

"Since Badger's death I have paid Mary Badger as follows:

"Apr. 5, '07—\$240; Oct. 17, '07—\$240; Apr. 17, '08—

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\$240; Oct. 14, '08—\$240. I have received from Mr. Rich \$1,030.86 in all (\$430.86 int.; \$600 principal)."

These entries point to an additional interest which the defendant Mary B. S. Badger had in the transaction. She acted with Milton College in procuring mortgages and notes to be made. After the husband died she would get the interest payments from the college, and, in addition, there was another \$1,000 that was a lien upon the house and lot upon which they lived. She got an additional benefit out of that. It was probably not very difficult for the traveling evangelist and this second wife to control the old doctor in his sickness and his feebleness.

In a recent case of *In re Estate of Paisley*, 91 Neb. 139, this court was called upon to determine the condition of the testator at the time he executed a will in favor of the proponent. The reasons in that case for setting aside the will and guarding the interests of the relatives of the testator are very like the reasons which exist in this case as to whether the deed to William Henry Rich and the mortgage made by him should stand. The judgment of the lower court in the *Paisley* case was reversed because of the feebleness of the testator at the time the will was made, and because of the undue influence of the proponent and her sister and brother-in-law. In the instant case, Dr. Badger seems to have been naturally frail and delicate physically, and his powers of mind seem to have been reduced by long continued illness and old age, for he was beyond 80, and he was without means to resist the importunities and influence of his younger and stronger wife, and the rather adroit Mr. Kelly, who was seemingly anxious to commend himself to the college corporation for his efficient services in procuring financial aid. Our view concerning the condition of the grantor at the time of making the deed and mortgage and the exercise of an undue influence in making the deed and consummating the thing does seem to be sustained by the following cases: *In re Estate of Frederick*, 83 Neb. 318, 321; *Orchardson v. Cofield*, 171 Ill. 14, 40 L. R. A. 256, 63 Am. St. Rep. 211;

Purdy v. Hall, 134 Ill. 298; *Hampson v. Guy*, 64 L. T. Rep. n. s. (Eng.) 778; *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587; *Bennett v. Bennett*, 65 Neb. 432, 441. The case last cited is instructive and fully sets forth the views of this court. Among other things held are the following: "Although mental weakness may fall short of entire incompetency to transact business, if it is taken advantage of to procure a conveyance by inequitable means the conveyance may be set aside." Also: "A court of equity will scrutinize jealously a transaction as to which there is ground for holding that influence has been acquired over a person of weak mind and has been abused." In support of the first point the court cited *Loder v. Loder*, 34 Neb. 824; *Kleeman v. Peltzer*, 17 Neb. 381; 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 947.

An examination of the evidence shows that the deceased, Charles Badger, at the time of the execution and delivery of the deed to the defendant William Henry Rich, was feeble and infirm in body and mind, and also at the time he delivered the said notes and mortgage to the defendant Milton College, through M. B. Kelly, that he was unduly influenced and overpersuaded by the said M. B. Kelly and his wife, Mary B. S. Badger, and that the said conveyance to the defendant William Henry Rich and the said notes and mortgage delivered to the said defendant Milton College were so executed and delivered without consideration.

The judgment of the district court is reversed, and the conveyance of the land by deed to William Henry Rich is set aside and canceled, as also the notes and the mortgage executed by said Rich and delivered to the said Milton College, and title to the land in controversy, to wit, the northwest quarter of section 33, in township 18 north, of range 13 west of the 6th P. M., in Valley county, Nebraska, is forever quieted in the appellant, Kate M. Holladay.

REVERSED.

SEDGWICK, J.

I concur only in the result reversing the judgment of the district court.

ROSE, J., dissents.

GEORGE THRASHER V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1912. No. 17,503.

1. **Rape: EVIDENCE.** The unquestioned proof that a female child of the age of 17 years was pregnant and dies from the effects of an abortion is sufficient evidence of the fact that some one had had sexual intercourse with her at the time of age which is prohibited by statute.
2. ———: ———. The evidence by which it was sought to prove the guilt of the defendant of the crime of statutory rape was largely circumstantial, although not wholly so. The facts testified to are examined and found to be sufficient to be submitted to the trial jury.
3. ———: ———: **PRIVILEGED COMMUNICATIONS.** In a trial of a charge of statutory rape, where the female child died from the effects of an abortion criminally produced, evidence by the physicians who attended her in her last illness, and who were present at the time of the miscarriage, as to what they discovered upon an examination of the patient during such attendance is not prohibited by the law of this state.
4. **Instructions,** both given and refused, are examined, though not set out in the opinion, and no reversible error is found in them.
5. **Criminal Law: NEW TRIAL: DISCRETION OF COURT.** Where misconduct on the part of a bailiff in charge of a trial jury during their deliberations is alleged in a motion for a new trial, and the issue is submitted upon conflicting affidavits, the decision of the district court thereon will not be reversed unless found to be clearly wrong.

ERROR to the district court for Scott's Bluff county:
RALPH W. HOBART, JUDGE. *Affirmed.*

M. S. McIninch and L. L. Raymond, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

REESE, C. J.

An information was filed in the district court for Scott's Bluff county, accusing plaintiff in error, George Thrasher, who will be referred to as the defendant, of the crime of statutory rape committed upon one Edith Perry on the 15th day of April, 1911, in said county; the said Edith Perry being at said time but 16 years of age and not previously unchaste. A plea of not guilty was duly entered and a jury trial had which resulted in a verdict of guilty. A motion for a new trial was filed and overruled, when defendant was sentenced to imprisonment in the penitentiary for the term of eight years. He alleges error, and brings the case to this court for review.

The evidence shows that on or about the 25th day of August, 1911, the said Edith Perry died from the effects of an abortion, criminally produced, and that at the time of her decease she was 17 years of age. These facts being undisputed, it is settled beyond controversy that some one had illicit relations with her at an unlawful age at or about the time alleged. The fact that defendant was over 18 years of age at the time of the alleged intercourse was also established. So far as the evidence is concerned, the case is narrowed down to the one question of the identity of defendant as the guilty person.

Upon the trial he became a witness in his own behalf, and testified that he had never at any time had sexual relations with the decedent. She being dead, of course her testimony could not be had. The evidence on the part of the state was therefore largely circumstantial. There were many phases of the case in which the evidence was conflicting. These conflicts were, in almost all instances,

between the testimony of the state's witnesses and that of defendant, consisting in the main of his denial of their statements as to his conversations and conduct. The former personal chastity of the decedent was not directly attacked, and the evidence in its support was sufficient for its submission to the jury. The evidence tended to prove that for perhaps a year or more defendant and Miss Perry were often together, he waiting upon her as a close associate, if not a suitor; that he frequently visited her at her home, on one or two occasions remaining with her in the parlor or sitting room all night; that they were often seen upon the streets of the village where they resided, both by day and night, and at one time were in the store, where defendant was employed as a clerk, after night and without a light. She was employed in a hotel, where her last sickness came upon her, and from where she was removed to her home a short time before her death. While she was sick at the hotel he visited her and appeared to be interested in her case and in the physicians employed. One physician testified that some six weeks before her death defendant applied to him for "medicine to cause a girl to come around;" that he said to the physician the girl was pregnant, and the request was refused. The father of the decedent testified that at the time of the arrest of defendant they had a conversation in which defendant requested the father to help him out of his trouble, and in which he admitted the illicit relations, but denied having taken any part in causing the abortion which resulted in the death of Edith. There was other evidence of a more or less criminal character, but which we need not recount. Practically all of the alleged admissions and statements were denied by defendant upon the witness-stand, but the matter of the truth or falsity of the testimony was for decision by the jury, and with that feature of the case we can have nothing to do; the evidence being sufficient to submit to them.

The physicians who attended the decedent in her last sickness were called as witnesses, and testified as to her

condition at that time and the cause of her death. Their testimony was objected to on the ground that it violated the law of privileged communications. The contention is probably based on the provisions of sections 333 and 334 of the code, which prohibit the disclosure of confidential communications to a physician, etc. The physicians testified to the physical facts discovered by them in their treatment of the decedent, and as to their course of treatment. We had never understood that the rule extended so far as is claimed by defendant. The testimony had no reference to him, and there was nothing for him to waive. The prohibitions of the section were not in his "favor." So far as we are aware, the provisions of the section have never been held to apply to cases of this kind. No authorities so holding are cited. Communications between patient and physician were not privileged at common law, but depend alone upon the statute. It is to be applied only as between them, and is for the protection of the patient. 1 Wharton, Criminal Evidence (10th ed.) sec. 516; *Hauk v. State*, 148 Ind. 238, 260; *Boyle v. Northwestern Mutual Relief Ass'n*, 95 Wis. 312, 322; *Pierson v. People*, 79 N. Y. 424, 433. In Underhill, Criminal Evidence (2d ed.) sec. 180, it is said: "A construction, which would operate to convert a statutory provision, intended to protect a patient from damaging or objectionable disclosure, into a protection for a person accused of the murder of the patient, cannot be admitted, nor can we believe that such was the legislative intent"—citing *People v. Harris*, 136 N. Y. 423; *Hauk v. State*, 148 Ind. 238. We are unable to see that the same class of evidence is inadmissible in cases of this kind. There was no error in the admission of the physicians' testimony.

Some objection is made to the action of the court in refusing to give the jury certain instructions requested by defendant, and in giving instructions by the court upon its own motion. We have examined all with care, and are unable to detect any error in the matters named. The principles involved in the instructions refused were suffi-

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ciently included in those given, and we find no prejudicial error in any instructions given and complained of. We have examined all instructions, both given and refused, and are persuaded that the cause was fairly and fully submitted by the instructions given. An analysis of each would extend this opinion to an unwarrantable length without the accomplishment of any compensating results.

Upon the close of the state's evidence, and also after the evidence had all been given, the defendant moved the court for a directed verdict in his favor. The motions were both overruled, and to which defendant excepted. The action of the court thereon is now assigned as error. Since our conclusion upon the whole case necessarily covers the questions presented by the motions, they will not be specifically noticed nor separately discussed.

Complaint is made of the alleged action of the bailiff in charge of the jurors during their deliberations. It is claimed by the state that the affidavits upon which the matter was submitted to the court are not preserved in the bill of exceptions, although set out in the abstract. We do not pass upon the question of their preservation, for the reason that, were the facts as stated in defendant's affidavits true, we would hesitate to set the verdict aside on that ground alone. But they are contradicted by other affidavits, thus presenting a question of fact, and we cannot say that the decision of the court thereon was wrong.

With a full appreciation of the importance of this case to defendant, we have examined the evidence adduced upon the trial, and are satisfied that the questions presented were properly submitted to the jury and were for their determination.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

ARTHUR W. NIXON V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1912. No. 17,546.

1. **Intoxicating Liquors: ILLEGAL SALE: EVIDENCE.** In a prosecution for the sale of spirituous and intoxicating liquor called whiskey, in violation of chapter 50, Comp. St. 1911, evidence that the liquor sold, without a license, to the prosecuting witnesses was intoxicating, that it looked like whiskey, and tasted like whiskey, is sufficient to sustain a conviction. *White v. State*, 88 Neb. 177.
2. ———: ———: **INSTRUCTIONS.** In such a prosecution, if the evidence is conflicting, the court should submit the case to the jury under proper instructions, and an instruction that "the law of Nebraska provides that all persons who shall sell any spirituous liquors or any intoxicating drinks without first having obtained a license for selling such liquors shall be deemed guilty of a misdemeanor" is without error.
3. ———: ———: ———. Other instructions examined, the substance thereof stated in the opinion, and held to be without error.
4. ———: ———: **EVIDENCE.** On the trial of such a case, it is not error to permit the state to introduce in evidence the federal liquor license issued to the defendant, where the sole objection to its introduction is that it was obtained from him by stealth.

ERROR to the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Edwin Falloon, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

BARNES, J.

The plaintiff in error, hereafter called the defendant, was tried in the district court for Richardson county on an information containing four counts, in each of which he was charged with the crime of selling spirituous and intoxicating liquors called whiskey without a license. He was found not guilty on the first two counts, and guilty

as charged in the third and fourth counts of the information. He was sentenced to pay a fine of \$300 on each count, together with the costs of prosecution, and to stand committed until the fines and costs were paid. To reverse the judgment of the district court he has brought the case here by a petition in error.

Defendant's first contention is that the evidence is wholly insufficient to sustain the verdict. It appears that the third count of the information charged that defendant did, on or about the 26th day of March, 1911, in the county of Richardson, state of Nebraska, unlawfully and wilfully sell to one Robert Ankrom certain spirituous and intoxicating liquors, to wit, one gill of whiskey, without having obtained a license therefor. The abstract, record and briefs show that upon the trial Ankrom testified, in substance, that he was living in Barada on the 27th day of March, 1911, where he had always lived; that he was acquainted with the defendant, Arthur Nixon; that he did not remember whether he was in there on the 26th day of March of that year, but that he visited Nixon's place of business very frequently and frequently drank there. He said: "I can't say I remember of drinking whiskey. I can't tell what it was. If a man drank enough of it, it would intoxicate him. I didn't buy the drink. I drank in there with James Graham on or about the 1st of March. I can't say what I drank, but it was within the last 18 months. I drank with Al Davis. I don't think anybody paid for it. I don't remember what we called for. I don't remember the number. I don't think it was over four. I took one drink with Mr. Davis. I was satisfied with that. I took a drink with Al Davis. The drink was colored like whiskey. I didn't smell it. I tasted it, and it tasted like whiskey. I only took one drink. I suppose the graduate was half full. At the time I drank with Davis, Davis called me up and Nixon waited on me. I have not purchased within the last 12 months any liquor that looked like whiskey. It was the same color. I usually paid 10 cents for a drink. I never bought any by the

bottle. I never bought any by the jug. Within the last 12 months I think I have bought something that looked like whiskey and tasted like whiskey, and paid 10 cents for it. I never became intoxicated on it within the last 12 months." The witness also testified on cross-examination that he never bought any whiskey at Nixon's place of business within the last 18 months. "I don't know whether Nixon treated us or not, but I don't think the drink was paid for, not that I know of. I can't swear that this treat was whiskey." On redirect examination the witness further said: "This stuff that I have been drinking at Nixon's place I would not swear it was whiskey. If one drank enough of it he might become intoxicated. I didn't get any of this stuff at Nixon's place in March of this year, nor April. I might of bought some in May. I don't remember the time of the month of May I bought it. I think, if I bought it at all, it was about the middle of the month. I called for medicine. I suppose he understood me. We went into the back room and took it from a bottle. It looked like one of those patent medicine bottles, a square bottle. Sometimes he poured it out, and sometimes I did. Sometimes I paid for it, and sometimes I didn't. I usually paid 10 cents. I didn't tell what particular ailment I wanted the medicine for. I can't tell the jury what it was. He gave me medicine for headache, for dyspepsia, for the appetite, an appetizer. It kind of braced a fellow up."

The fourth count of the information charged that the defendant, in the county of Richardson, and state of Nebraska, on or about the 28th day of March, 1911, did unlawfully and wilfully sell to one Albert Davis certain spirituous and intoxicating liquors, to wit, one gill of whiskey, without having first complied with the laws of the state of Nebraska, and obtained a license therefor. To support that count of the information Albert Davis testified, in substance, as follows: I live north, just across the line of Nemaha county. Was living there during the month of last March. I was in Barada nearly every day along through March, at least three times a

week. Am acquainted with Arthur Nixon, and have been in his place of business. I have purchased of him groceries, some hardware and drugs. On or about the 25th day of March I bought something I suppose was whiskey. It was red looking stuff. It was a poor article of stuff whatever it was. It tasted to me like it might have been whiskey, a poor grade of whiskey. Well, if a man would drink enough of it I suppose it would make him crazy. I bought this stuff of him. I paid all kinds of prices, from 10 cents up. I usually paid 10 cents a drink. When I bought it by the bottle I paid from 25 cents to \$1, owing to the size I bought. When I got this liquor I called for booze. I drank with Bob Ankrom at the time he would not pay the assessment. We drank red-eye booze, and I paid for it. We drank it out of a small like glass, I think it was a wine glass, as well as I remember.

It appears, without dispute, that the defendant was engaged in the business of selling hardware, groceries and drugs in the village of Barada, in Richardson county, Nebraska, at the several times mentioned in the information. The defendant positively denied on oath that he sold any whiskey to Robert Ankrom or Albert Davis at any time within 18 months before the time alleged in the information. Defendant also produced three witnesses to impeach the testimony of Albert Davis, each of whom testified that on a certain day in a saloon conducted by one Hunker, while drinking with the defendant Nixon, and at his expense, Albert Davis said, in substance, that he never bought any whiskey of the defendant. Davis, however, denied that he had ever made such a statement.

The foregoing is the substance of the evidence on which the case was submitted to the jury. The probative effect of this evidence was a question for the jury, and, notwithstanding the witnesses for the state avoided stating in clear and direct language that they knew the liquor that they purchased of the defendant was whiskey, still the jury, taking into consideration their reluctance to testify against one who had thus favored them, might well have

concluded that the liquor was what one of the witnesses said seemed to be a poor quality of whiskey. In any event, in the light of this testimony, it cannot be said that the liquor was not intoxicating. We are therefore of opinion that the evidence was sufficient to sustain the verdict, and we would be invading the province of the jury to hold otherwise. *White v. State*, 88 Neb. 177.

Defendant also contends that the court erred in giving and refusing instructions. By the third instruction the court charged the jury that "the law of Nebraska provides that all persons who shall sell any spirituous liquors or any intoxicating drinks without first having obtained a license for selling such liquors shall be deemed guilty of a misdemeanor." It is argued that this instruction is erroneous because under its direction the jury could convict for the sale of spirituous liquors or any intoxicating drink. We think this instruction contains a fair statement of the law, as we understand it, and the district court did not err in giving it.

By the fourth instruction the court charged the jury as follows: "You are instructed that it is not necessary that any witness testify positively as to the particular name of the liquor. It is sufficient, if you are satisfied from all the facts and circumstances in evidence that the liquor so sold, if any, was intoxicating liquor of the kind generally known as whiskey. The name or lack of name given to such liquor is not material, if the kind and character of such liquor is shown by the evidence to be as alleged in the information." We think this instruction is correct, and is fairly within the rule announced in *White v. State*, *supra*.

At the request of the state, the court instructed the jury that the beverage commonly known as whiskey is an intoxicating liquor, and, if you believe from the evidence beyond a reasonable doubt that the defendant sold whiskey as charged in the information, your verdict should be guilty. The jury were also told in the same instruction that it was not necessary for the state to prove the com-

ponent parts of the beverage alleged to have been sold, or make a chemical analysis of the same; that it was sufficient if they were satisfied from the evidence beyond a reasonable doubt that the defendant sold the beverage commonly called and generally known as whiskey as charged in the information, and that the beverage so sold was intoxicating. From an examination of the authorities, both in this and other jurisdictions, we are satisfied that this instruction is without error.

Complaint is made because the court refused to instruct the jury that a conviction could not be had upon mere suspicion, however strong. An examination of the instructions given by the court upon his own motion, and the one requested by the defendant and given by the court, in which it was clearly stated that it was incumbent upon the state to prove beyond a reasonable doubt all the material allegations of any or all counts of the information; that the material allegations of the counts of the information are that the beverages charged as sold are whiskey; that they were sold, if at all, to the persons named in the information, and that any or all of the sales, if made, were made within 18 months next preceding the commencement of this prosecution (June 15, 1911); that the charge in the information that the sales were made without a license is material—obviated any necessity for instructing the jury that they could not convict the defendant upon mere suspicion. As we view the record, the case was fairly tried, and the instructions are without error.

Finally, it is contended that the court erred in permitting the state to introduce in evidence the federal liquor license issued to the defendant, because it had been obtained by the state by stealth. In *Younger v. State*, 80 Neb. 201, objection was made to the introduction of defendant's shoes, upon the ground that they were taken from him by force, and it was held that, where matters are offered in evidence on the trial of the case which are pertinent to the issue, they should be admitted, and the court will not take notice of how they are obtained. To

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the same effect are *Geiger v. State*, 6 Neb. 545; *Russell v. State*, 66 Neb. 497; *Williams v. State*, 100 Ga. 511, 39 L. R. A. 269; 1 Bishop, New Criminal Procedure (4th ed.), secs. 210-212. As defendant cites no authority in support of this contention, and in view of the authorities above mentioned, we are of opinion that the receiving of the federal license in evidence presents no ground for a reversal of the judgment.

The evidence clearly shows that the defendant, in the back room of his store, in Barada, Richardson county, Nebraska, at or about the time charged in the information, sold intoxicating liquors, which the witnesses say looked and tasted like whiskey, to the persons charged in the information. It was admitted that he had no license to make such sales, therefore the judgment of the district court should be, and is,

AFFIRMED.

ENTERPRISE IRRIGATION DISTRICT ET AL., APPELLEES, V. TRI-STATE LAND COMPANY ET AL., APPELLANTS.

FILED OCTOBER 18, 1912. No. 17,522.

1. **Waters: IRRIGATION: APPROPRIATION OF WATER.** Before the 1911 amendment to section 18, ch. 69, laws 1895, and under the irrigation act of 1889 (laws 1889, ch. 68), one who has constructed a canal for the purpose of carrying water for hire to be used upon the lands of others, and is ready and willing to furnish the water to such landowners as will take it, has made the only application of water to a beneficial use that he can make, and his right to an appropriation continues as a developing right until all lands along the canal for which the water was originally appropriated use the same; provided, formerly, that the water be applied to the land within a reasonable time, and, now, within the time limited by statute.
2. **Statutes: IRRIGATION ACT: CONSTITUTIONALITY.** The constitutionality of the irrigation act of 1895 and of the provisions thereof creating the state board of irrigation and conferring on the board the right to determine priorities, reaffirmed—following *Crawford*

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Oo. v. Hathaway, 60 Neb. 754, 61 Neb. 317, 67 Neb. 325, and
McCook Irrigation & Water Power Co. v. Crews, 70 Neb. 115.

3. ———: ———: DUE PROCESS OF LAW. Where a statute authorizes a proceeding under the police power of the state affecting property rights, and does not expressly provide for notice to be given to the property owner, the right to notice is implied, and where a proper notice has been given, under a procedure authorized by the legislature, and the party interested has appeared, he has not been deprived of any of his rights without due process of law.
4. ———: ———: ———. The legislature has power to delegate the duty of formulating rules of procedure before the state board of irrigation, and the fact that the method of procedure is not embodied in the statute does not render due process lacking in the proceedings of the board.
5. **WATERS: IRRIGATION: APPROPRIATION OF WATER: PRIORITIES.** In determining priorities of appropriation under the act of 1895, the transcripts of posted and recorded notices transmitted by the county clerk to the state board of irrigation constitute the "claims" for adjudication.
6. ———: ———: ———: **ISSUANCE OF CERTIFICATE: LIMITATIONS.** The limitation of 30 days within which to issue a certificate by the board of irrigation, under section 21 of the 1895 act, is merely directory. Such certificate does not constitute the adjudication, but is merely evidence thereof.
7. ———: ———: ———: **POWER OF STATE BOARD OF IRRIGATION.** In determining priorities under sections 15-27 of the act of 1895, the board of irrigation, although it might recognize and determine existing conditions and limitations, was without power to impose new.
8. ———: ———: ———: **ABANDONMENT.** Under the facts set forth in the opinion, *held*, that the right of the Tri-State Land Company to an appropriation, as successor in interest of the Farmers Canal Company and Roberts Walker, was not lost by lack of diligence, nonuser or abandonment.
9. ———: ———: ———: **NOTICE OF CLAIM: RECORD.** The posting and recording of notices of "claims" to the waters of the state, under the laws of 1889, ch. 68, *held* to be a public record, of which all parties interested were bound to take notice, and with knowledge of which they were chargeable.
10. ———: ———: ———: **ESTOPPEL.** After it had been adjudged that Roberts Walker had a valid appropriation to 1,142 6-7 cubic feet of water per second of time from the North Platte river,

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with priority dating from September 16, 1887, the Tri-State Land Company purchased all his rights in the appropriation and canal. It immediately began the expenditure of large sums of money in the enlargement and completion of the canal, and carried the same forward with diligence from year to year until it had expended nearly \$2,000,000. In 1906 it applied to and received leave from the state board of irrigation to construct a needle dam in the river for the purpose of conducting water into its headgate, and thereafter erected the same at large expense. There being insufficient water in the river during the months of July, August, and September to supply the amount claimed by the Tri-State Land Company and also to supply the amount to which the plaintiffs are entitled, plaintiffs began this action in 1909 for the purpose of adjudicating priorities of the respective water users in the river, and procuring a decree that their rights are superior to those of the Tri-State Land Company except as to about 28 second feet, and for an injunction to restrain the use or diversion of more than that quantity of water by the defendants. *Held*, That since the plaintiffs stood by for more than four years with full notice and knowledge of the "claims" of the defendants to an appropriation of 1,142 6-7 second feet, and permitted defendants to expend nearly \$2,000,000 without objection or without notice of their claims to a prior appropriation, and without beginning an action to restrain the diversion of the water in excess of the amount which they concede defendants are entitled to, they are estopped, after the substantial completion of the canal and works, to maintain this action.

APPEAL from the district court for Scott's Bluff county :
RALPH W. HOBART, JUDGE. *Reversed and dismissed.*

C. O. Flansburg and Wright & Duffie, for appellants.

Morrow & Morrow, Harry N. Haynes, Wilcox & Halligan, G. J. Hunt and W. W. White, *contra.*

LETTON, J.

This action was begun on August 23, 1909, by the Enterprise Irrigation District claiming an appropriation of water from the North Platte river, under a claim made by the Enterprise Ditch Company in March, 1889, to whose rights the plaintiff has succeeded by purchase. A large number of other persons and corporations claiming ap-

appropriations of water from the North Platte river in Scott's Bluff and Cheyenne counties are made parties defendant. When the issues were finally made up, it appeared that plaintiff and each of the defendants except the Tri-State Land Company and the Farmers Mutual Canal Company were interested in having the prayer of the petition granted, and that practically the same relief is sought by each of them against two defendants named. There is one exception to this general statement, which will be hereafter noted. Throughout the opinion therefore, for convenience, the two latter-named companies will be designated as defendants and all the other parties as plaintiffs. The state board of irrigation and the secretary of the state board will be hereafter termed the state board or the secretary, as the case may be.

The pleadings are exceedingly lengthy and involved, therefore no attempt will be made to set them out in detail. The cause was tried upon the pleadings and upon an agreed stipulation of facts, so that the questions presented are practically questions of law.

The dispute may be summarized thus: The defendants claim an appropriation of water to the extent of 1,142 6-7 cubic feet prior in point of time to an appropriation by any of the plaintiffs, and an adjudication in their favor by the state board to this extent. The plaintiffs' claim is that an appropriation to the extent of more than 28 feet never actually vested in the Farmers Canal Company or its successors, and that by the actual beneficial use of water by the plaintiffs before the water had been put to beneficial use by the defendants, and before the canals of defendants had been constructed, plaintiffs acquired a prior right to all but 28 second feet of the water claimed by defendants. They further contend that, if the Farmers Canal Company ever acquired an appropriation for the full amount, it had lost the same by nonuser. The defendants assert the validity of their appropriation, that it is prior in point of time to that of any of the plaintiffs, and deny its loss by nonuser or abandonment. They also plead

an estoppel by reason of plaintiffs standing by with knowledge of their claims for years and allowing them to expend vast sums of money in the carrying out of their enterprise, without notice of any hostile or adverse claim of superior right until after the works were practically completed. At the close of the trial the court found for each and all of the plaintiffs and cross-petitioners, except the Mitchell Irrigation District, and rendered a decree which ascertained and adjudged the respective appropriations to which the parties were entitled and established their respective priorities, without reference to the action of the state board in 1896 and 1897. The Tri-State Land Company and the Farmers Mutual Canal Company were adjudged to have an appropriation of 28.57 cubic feet per second only, instead of 1,142 6-7 second feet as claimed, with priority dating from September 16, 1887. As to any excess over this amount, if an appropriation was ever acquired, it had become lost by a failure to apply the same to a beneficial use for a continuous period of more than ten years. As to the Mitchell Irrigation District, the court found that, because its canal heads in the state of Wyoming and the water is diverted into it in that state, the court had no jurisdiction of the subject matter of its cross-petition, and the same was dismissed.

Much abbreviated, but preserving those facts we consider material to the controversy, the stipulation of facts upon which the case was submitted shows that the lands are in the valley of the North Platte river, and that the amount of water flowing in the bed varies greatly at different times in the year. During April, May and June the amount usually has been sufficient to supply all water necessary for irrigation to the canals thus far constructed. There are no tributaries between the headgate of defendants' canal and the headgate of the canals of any of the plaintiffs. If no water were diverted at defendants' headgate, the quantity of water flowing would not be materially increased or diminished when it reached the headgate of the lowest canal, belonging to a party to this suit. On the

16th of September, 1887, the Farmers Canal Company, a corporation, posted a notice at the proposed point of diversion of its intention to divert from the North Platte river for the purpose of irrigation a quantity of water sufficient to fill a canal 40 feet wide on the bottom and carry water to a depth of 4 feet, and on the same day notice was duly filed and recorded in the office of the county clerk of Cheyenne county which at that time included the territory now embraced in Scott's Bluff county. In March, 1888, the Farmers Canal Company commenced the construction of the canal, and continued work on it until about the year 1890, at which time it was constructed a distance of about 10 miles. The ditch was then about 12 feet wide on the bottom just below the headgate. The first mile was about 6 feet deep, and was capable of carrying water to a depth of 2 feet. There were not more than 1,500 acres susceptible of irrigation from the canal as then constructed, and the capacity of the canal was not sufficient to carry water for more than 1,000 to 1,200 acres of land. On November 17, 1890, this company posted at the headgate, and filed for record in the office of the county clerk of Scott's Bluff county, a notice of its intention to divert water, in addition to its former claim, to the amount of 200,000 miner's or statutory inches. The notice also specified that the canal shall be 80 feet wide on the bottom, with a slope of one to one, and a depth of 8.84 feet at the point of the diversion, with an average grade of not more than 2 feet per mile. In 1891 the canal company issued bonds secured by mortgage upon all its property, and sold about \$80,000 worth. In the spring of 1892 it resumed work on the canal with the proceeds of the sale, constructed a substantial headgate costing about \$8,000, and excavated the canal to a width of about 100 feet to a point 500 feet below the headgate, and from there to a point about 4,000 feet below to a width of 60 feet on the bottom, and from there to a point about 19 miles below to a width of 30 feet on the bottom, and water was conducted from the river therein. The canal as constructed was

capable of carrying water to a depth of 6 feet, and was of sufficient capacity to irrigate 30,000 acres of land. Twenty-five miles of the canal from a point below the 19 miles mentioned had been opened up at various places to the full width, and nearly one-quarter of the work thereon had been performed in detached sections, but had not been connected up with the 19 miles above. All this work was accomplished by June 1, 1893, at a total expenditure of about \$96,000, when the company ceased work on the canal because of inability to procure funds, except that it kept one team employed which continued excavation work until October, 1895. From that time the Farmers Canal Company did no further work upon the canal. As then constructed there were 5,661.5 acres of land susceptible of irrigation from the canal, and other lands lying under the Enterprise and Ramshorn ditches to the amount of 2,540 acres which were also susceptible of irrigation from this canal, had not the Enterprise and Ramshorn ditches been built to irrigate such lands. Prior to 1897 not more than 500 acres had been irrigated annually from the canal; prior to 1907 not more than 2,000 acres; in 1907, 5,000 acres; in 1908, 7,000 acres; in 1909, 10,000 acres; and in 1910, 20,000 acres of land were irrigated from the canal. In 1897 and 1898 work was done by the company and users of water with its consent in repairing the canal and protecting its banks and headgate. After work ceased, the company endeavored to sell its bonds and to exchange bonds with different contractors for the purpose of building a canal, which negotiations continued until after the mortgage upon the property was foreclosed.

The stipulation sets out with much particularity that, at various dates in a period extending from January 14, 1888, until the 1895 act took effect, the other plaintiffs or their grantors, except the Steamboat Ditch Company and the Gering Irrigation District, each posted notices and duly filed and recorded the same, claiming various amounts of water from the river, and that each constructed canals and appropriated the amounts of water it now claims in

the petition and cross-petitions. The Steamboat Ditch Company made application to the state board under the 1895 act on October 22, 1895, and the Gering Irrigation District on March 15, 1897, for permits to appropriate water. Permits were granted, their canals were constructed, proofs filed with the state board as to each of said claims, and a certificate was issued to the Gering Irrigation District, the priority dating from March 5, 1897. In May, 1895, the county clerks of the two counties in which the lands irrigated lie made transcripts of the notices of appropriation on file in their respective offices and transmitted them to the secretary of the state board in whose office they were filed on May 31, 1895. After the transcript was filed the secretary sent to each of the claimants named in the notices a blank claim to be filled out. A copy of this blank is attached to the stipulation. This blank is in form an affidavit, and sets forth the name of the claimant; the purpose for which water is claimed; the name adopted for the ditch; the source of the appropriation; its amount; the location of the headgate; the length of the ditch; the sections of land through which the canal passes; together with a plat showing the same; the portions of the canal completed or not completed; the dimensions of the uncompleted portions; total excavation; length of fluming required; material removed and fluming completed; estimated cost; expenditure thus far incurred; land to be irrigated; time of beginning work; when works were or will be completed; whether claims are made on account of application of the water to a beneficial use without objection or by posting notice and filing the same; when water was or will be turned into the ditch; acres actually irrigated and estimated to be irrigated; and the relation which the affiant bears to the ditch, canal or other work.

On August 20, 1895, the state board adopted resolutions providing and establishing at large and in detail the procedure and practice of the board in ascertaining and adjudicating water rights already vested, and for the con-

sideration of new applications for the use of water. It also provided for practice and procedure in case of the contest of claims. These rules provided for notice, and for hearings, rehearings, and appeals. Prior to June 5, 1896, the rules adopted by the state board were printed in full in pamphlet form, and, as so established and published, were accepted by the state board and its secretary in matters of procedure thereafter. On the 5th of June, 1896, the secretary mailed a notice with a copy of the rules to each and all of the parties to this suit or their predecessors in interest. This notice was as follows: "Office of State Board of Irrigation. Lincoln, Nebr., June 5, 1896. Notice. Notice is hereby given that the hearing in the matter of adjudicating rights to the use of water claimed prior to April 4, 1895, within the water-shed of the North Platte and Platte rivers, will be held for the several counties therein, by an officer of the state board of irrigation at the places and upon the dates indicated, as follows: (Omitting other counties.) For Cheyenne and Banner counties, in Bayard, on Tuesday and Wednesday, July 14 and 15, 1896. For Scott's Bluff and Sioux counties, in Gering, on Friday, July 17, 1896, at office of O. W. Gardner. Claimants are expected to attend at hearings for their respective counties in order to furnish to the officer presiding at said hearing the necessary proofs, if any be required, to sustain their claims; otherwise said claims will be dismissed. State Board of Irrigation. W. R. Akers, State Engineer, Secretary." This was the only notice forwarded by the board or its secretary to any of the parties to this action. On and prior to the 17th day of July, 1895, the owners of the Brown's Creek, Chimney Rock, Castle Rock, and Alliance ditches procured to be filled out, verified and filed with the secretary, by some of the officers of their respective companies, the blank forms sent out by the secretary. On July 14 and 15 the secretary at Bayard, Nebraska, made inquiries and took evidence as to the claims of the owners of Chimney Rock, Nine Mile,

Alliance and Logan canals, and the claim of the Belmont canal was submitted on the record, without evidence. On July 17 the secretary made inquiries and took evidence at the office of O. W. Gardner, in Gering, Nebraska, in reference to the claims of Yorick Nichols and Carrol Nichols and the owners of the Enterprise, Castle Rock, Minatare, Central and Farmers canals. No contest was made as to any of the claims. The evidence was reduced to writing and made a matter of record in the office of the secretary.

The stipulation then sets out the evidence offered in behalf of the Farmers Canal Company. This shows, in addition to the facts already stipulated, that the cash investment was something over \$100,000, and that the canal was designed to irrigate 80,000 acres; that the canal did not strike the large bodies of land until the lower end, and that the company expected to resume work in the near future and were still negotiating in order to procure money. At this time the secretary allowed the company 30 days in which to file a claim setting out specifically the lands they expected to water. No other hearing with reference to the above claims or either of them was ever applied for, ordered, or held, except that the Steamboat, Castle Rock, Belmont and Alliance ditches had rehearings on their respective applications subsequent to April 7, 1897, without notice to other claimants. The Farmers Canal Company, through an officer, filled out the blank claim affidavit, and filed the same on September 19, 1896, claiming 1,142 6-7 cubic feet per second of time, with priority from September 16, 1887. On January 7, 1897, the secretary rendered an opinion on the claim of the Farmers Canal Company, made the same a matter of record in his office, and forwarded a copy to the company, but no copy or notice of the opinion was sent or given to any of the other claimants for water. On the same day the secretary filed written opinions allowing the claims of the Enterprise, Minatare, Castle Rock and Central ditches, and at various dates from January 8, 1897, to January 28, 1897, opinions were filed allowing the claims of the Nine Mile,

Winter's Creek, Ramshorn and Brown's Creek ditches and adjudicating their respective priorities. On April 7, 1897, the state board, without notice other than may be imputed by law, caused a resolution to be entered upon its record affirming the findings of the secretary as to the claims of these parties, except Castle Rock, which was finally approved on September 22, 1897. None of the claimants were notified within 30 days of the adoption of this resolution, none of the plaintiffs acquired any knowledge or information concerning the same for several years after the adoption thereof. At various dates in August and September, 1898, other written opinions were filed as to the claims of the Belmont, Alliance and Chimney Rock Ditch companies, and on January 2, 1897, these opinions were affirmed by resolution as in the former claims. None of the opinions or resolutions, and no certificates as to priorities, nor any other information with reference to claims was ever transmitted to the county clerk of the respective counties, nor were any of such documents ever filed or recorded, except the opinion with reference to the claim of the Farmers Canal Company which was filed and recorded in the office of the county clerk of Scott's Bluff county on the 27th of December, 1905.

The stipulation then sets forth at length the default of the Farmers Canal Company upon its bonds; the foreclosure of the trust deed; and the purchase at the foreclosure sale of all the property of the company by Roberts Walker on December 23, 1901. It also recites the filing of an application in the office of the secretary on April 14, 1902, by one William Frank to appropriate water for a canal to be built along substantially the same line; the filing of protests by that company; intervention by the Farmers Irrigation District (which had also filed an application in June, 1902, for water to cover a part of the same territory); that a hearing was had, and the applications denied; that appeal was taken to the district court, which reversed the board, and that on appeal to the supreme court of the state of Nebraska its decision was

affirmed. It is also shown that by the final judgment of the district court the findings of the state board, "in so far as it finds the said Roberts Walker as the successor in interest of the Farmers Canal Company entitled to an amount of water from the North Platte river not to exceed 1,142 6-7 cubic feet per second of time, are hereby ratified and affirmed."

In 1904 the Tri-State Land Company was organized, and in February, 1904, it entered into an agreement with Roberts Walker for the purchase of the property conveyed to him under the decree of foreclosure, by which agreement \$60,000 was to be paid to him for the property in the event that the adjudication of the state board should be confirmed by the supreme court, and \$21,000 should be paid for the property if the judgment of the district court in the *Frank* case should be affirmed. After the judgment of the supreme court it received deeds and conveyances from Roberts Walker and from the Farmers Canal Company to the property. In August, 1905, the Tri-State Company began the reconstruction and enlargement of the canal, and also began to excavate, reconstruct and enlarge that portion of the canal lying below the 19-mile portion through which water had been theretofore conducted. In 1905 it expended in resurvey, reconstruction, machinery, tools and labor, \$133,066.46; in 1906 and 1907 work was prosecuted so that in the spring of 1907 the canal was constructed full size to a distance of 40 miles below the headgate. In September, 1906, application was made to the state board for leave to construct a needle dam across the river, which was granted in October, 1906, work begun, and \$8,000 expended thereon. In that year the company expended in enlargement, construction, deepening and widening, \$499,491.87; in 1907 the amount expended on dams, waste way, construction, etc., amounted to \$323,386.87, and the canal at the close of that year was completed for 60 miles and was capable of irrigating 60,000 acres of land. In 1908, \$52,410.67 was expended, and in 1909 \$464,535.13 was expended, and at the

close of that year the canal was capable of irrigating all of the land described in the opinion of the secretary and the claim of the Farmers Canal Company. The amount expended in 1910 is also set forth, but this we deem immaterial under the issues. Before this action was begun the Tri-State Land Company sold and conveyed to the Farmers Mutual Canal Company all of its property, taking in payment therefor the stock of said latter company. It now controls a majority of the stock, but has sold parties under its canal some 25,000 shares.

The average flow of the North Platte river during the last half of July and in August, September and October, at or near the headgate of the canal of the Tri-State Company, does not exceed 800 second feet, and frequently runs as low as 300 second feet; that in those months in 1910 the Tri-State Company diverted from 300 to 400 second feet, and during portions of the time this diversion exceeded all the water flowing in the bed of the river at that point; that, while the Tri-State was diverting all the water flowing in the river at its headgate, water had come to the surface below and was flowing in the river so that some of the plaintiffs received a specified part of the water they were entitled to. In July, 1910, the state board caused the headgates of the canals of all the parties to this action except the Tri-State Company to be closed, in order to allow the water to flow to an alleged prior appropriator whose canal is located near North Platte, Nebraska. Because of the rendition of the opinion on the claim of the Farmers Canal Company and the resolution of the state board, said board refused to close the headgate on the canal of the Tri-State, and the board claims that the Tri-State has a prior right to any of the parties to this action to divert 1,142 6-7 second feet as needed; that, unless restrained, the Tri-State Company will, under the direction and permission of the state board, divert the full amount of water claimed by it, even though the diversion consumes all the water flowing in the river. The irrigated lands have been used for the raising of diversi-

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that crops for certain crops require irrigation during July. Another fact is that the crops which require irrigation during these months are most profitable and remunerative than in case any of the lands under the ditches do not receive water during these months, the growers will be compelled to raise less remunerative crops, or will be compelled to provide power to water at an added expense. This summarizes the situation of facts.

The questions involved in this case are of the deepest importance, not only to the parties actually before the court, but to every owner of irrigated land in the state of Nebraska, since the plaintiffs challenge all right and authority of the state board to adjudicate priorities of appropriation under the act of 1895. If this contention be upheld, then more than 1,000 adjudications of prior claims which have been made by that board since the time of its first organization until today, a period of over 16 years, are absolutely void. Moreover, whatever the conclusion of the court may be, it is almost inevitable under the peculiar circumstances of the case that one party or the other will suffer serious loss. It is, therefore, with a deep sense of responsibility and a keen appreciation of the serious results, not only to the parties before the court, but to a vast number of water users in the state of Nebraska, that we approach the consideration of the questions involved.

The appellants contend, first, that the district court had no jurisdiction to establish priorities, that being exclusively for the state board; second, that the rights of the defendants were fixed and determined by the state board in the *Frank* case as affirmed by the supreme court, and that any attack thereon in a collateral proceeding can be of no avail; third, that there was no forfeiture; fourth, that by their own conduct the plaintiffs are estopped to assert any right as against the defendants' claim.

On the other hand, plaintiffs contend that defendants never acquired an appropriation for more than the amount of water allowed by the district court, for the reason that,

although the preliminary steps—the posting and recording of notice—were taken and the intention to apply water for beneficial use existed, yet the work was not prosecuted to completion with diligence, and water in excess of the amount allowed was not conducted to the place of intended use and applied within a reasonable time. It is also contended that the Farmers Canal Company had no vested appropriation at the time the irrigation act of 1889 was passed.

With reference to the claimed adjudication by the state board, it is argued, first, that that board never made a final adjudication or an adjudication intended to be final; second, that the board does not possess power or jurisdiction to enter an order or decree conclusively establishing rights acquired prior to the act of 1895, for the reasons that the entry of such an order would require the exercise of purely judicial powers, which such board does not and cannot possess, and, further, that if it is possessed of judicial powers the method provided by the statute for adjudicating such rights does not constitute due process of law; third, that the manner in which the board proceeded did not constitute due process of law, and its proceedings so far as they purport to be conclusive adjudications are absolutely void. It is also contended that the opinion in the Farmers Canal Company claim is void because it attempted to award an appropriation in excess of the claim made. The plaintiffs also deny that this proceeding is a collateral attack upon the adjudication of the board, and maintain that this is a direct attack upon an order made in excess of jurisdiction, and that the proceedings of the board were erroneous to the extent that it would be unconscionable to permit them to stand. It is further contended that, if any appropriation in excess of 28 second feet of water was ever acquired by the defendants, the same has been lost and forfeited by nonuser. And, as to the claim of estoppel, it is argued that the mere fact that plaintiffs remained silent and did not assert any hostile claim is entirely insufficient to constitute an estoppel. It

is also maintained that the opinion of the state board in the Farmers Canal Company claim did not purport to adjudicate a vested and completed appropriation for any definite quantity of water, and that the right of that company was limited by the opinion to water acquired for such lands as should be irrigated prior to September 1, 1905; that the limitation of the appropriation, if construed to be in excess of the jurisdiction of the board, if excised from the opinion, radically reconstructs it and would render it either void or make it reach a result contrary to what was intended and declared; that, if construed as an attempt to adjudicate and perfect an appropriation of more than 7.15 second feet, such excess is unsupported by any recorded statement of claim or evidence, and was beyond the jurisdiction of the board; that, if it be assumed that the adjudication was valid, then the nonuser of any water in excess of 28.57 second feet, together with the use during ten years by the other parties of all water in the river during low stages, has occasioned by prescription a loss to defendants and a corresponding gain to plaintiffs in the order of their priority.

Much of the argument in behalf of some of the plaintiffs discusses the question as to what constitutes an appropriation, and it is maintained with much force that there can be no valid and vested appropriation until the water diverted has been actually applied to a beneficial use. Many decisions of the courts of Colorado and other states are cited to uphold this contention. A different view is taken in the brief of counsel appearing for the Belmont Company and Alliance Irrigation District. Quoting and construing the statutes of 1889, he says: "The legislature never meant to encourage any one to invest their money in an enterprise, supposedly for a public good, and then to take away from him or them their appropriation simply because the landowner did not take the water within a specified time. That was a provision of subsequent legislation. The principle of the application of water to land before the absolute vesting of the appropriation was not

of the essence of the act. * * * There is nothing in the act that in anywise indicates that water must be applied to land in order to make the appropriation absolute. The act provides that, within a certain time after the posting of the notice, actual work of construction must be begun and in good faith carried forward to completion, and that by 'completion' is meant conducting the water to the place of intended use—to such place on the line of the canal as the landowner desires to receive it into and carry it through his laterals. * * * The act of 1895 (section 28) speaks of the application of water to a beneficial use, or for beneficial purposes, but the act of 1889 nowhere does. After a canal was constructed under the prior act, therefore, and the water conducted through the same, if the owner at all times stood ready and willing to carry water for such landowners as would take it, he made all and the only application that he could make, and all that the act expected him to make, and his right to his appropriation continued as a developing right until all lands under the canal were using water, and thereupon ripened into a complete appropriation." Counsel for other plaintiffs also concedes that "in some states, by statute, an appropriation is treated as effected when all the works are completed, the water is available for use, and there are lands reached by the system ready to be tilled by its occupants. In other states, by statute, the appropriation is not deemed complete until the beneficial use of water occurs. Such was the rule prior to legislation." See, also, sections 8-10, ch. 68, laws 1889, defining appropriation and completion of work. This subject is also considered to some extent in the monographic note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 777, 816 (30 Or. 59), where the commentator says: "The appropriation of water for sale to others is authorized by the statutes of the states in which it is valuable for that purpose, and, in many instances, the chief, and even the sole, object of an appropriator is not that of any use by him in and upon his own lands or mines, but the sale of the water to others who have mines to be worked

or lands to be irrigated. In cases of appropriation for the purpose of supplying water to others, we do not understand how it can be said that the use of the water is an essential element of its appropriation. If the intended appropriator constructs the works and appliances necessary for the diversion of the water and the carrying of it to points where its use is desirable and profitable, and has actually carried it there, or is ready and willing to do so, and offers it to all persons who are willing to pay for its use, we apprehend that his appropriation is complete, though the persons to whom it is thus offered refuse to receive or use it. They certainly cannot thus defeat the rights of the diverter." What the rights of the canal owner or of subsequent takers may be in such case it is unnecessary here to consider. A discussion as to this point may be found in *Sowards v. Meagher*, 37 Utah, 212, 108 Pac. 1112. This court has repeatedly said that a canal company is to a certain extent a public service corporation; that it does not own the water that it carries, but acquires by appropriation the right to divert the same and to charge a reasonable fee for the carriage of the same to the lands upon which it was designed to be used. *Parton & Hershey I. C. & L. Co. v. Farmers & Merchants I. & L. Co.*, 45 Neb. 884; *Castle Rock I. C. & W. P. Co. v. Jurisch*, 67 Neb. 377; *McCook Irrigation & W. P. Co. v. Creics*, 70 Neb. 115. Without further discussion, we are content to adopt the views as to what constitutes an appropriation under the act of 1889 thus stated by counsel, so far as relates to appropriation by a canal owner who is a carrier of water to be applied to a beneficial use upon land owned by others, with the reservation, however, that the water, formerly, must have been applied within a reasonable time in order to retain the first right to take it from the river, and, now, it must be applied within the time limited by the statute. Comp. St. 1911, ch. 93a, art. II, sec. 18.

One of the principal questions argued in the case is with respect to the validity and effect of the proceedings of the state board when it undertook to adjudicate priori-

ties under the command of section 16, ch. 69, laws 1895 (Ann. St. 1909, sec. 6795). We deem it unnecessary here to set out at length the provisions of the statute with reference to the adjudication of priorities, or the order which was made upon the claim of the Farmers Canal Company by the state board. These are all set out at length in the opinion in *Farmers Canal Co. v. Frank*, 72 Neb. 136. In that case it was held: "The powers of the state board of irrigation exercised under section 16, art. II, ch. 93a of the irrigation act of 1895, are *quasi-judicial* in their nature, and an adjudication by it of a right of priority of appropriation of water made before taking effect of the act of 1895, after proper notice, is final, unless appealed from, and cannot be collaterally attacked." That case was an appeal from an order of the board refusing two applications for appropriations on the ground that appropriations already were in existence for the same lands. The court decided in effect that, in a matter properly before it, the board had allowed an appropriation as claimed, and that it was concluded by its own prior order and adjudication. We are asked by the plaintiff to reexamine this doctrine, which it is earnestly contended is entirely erroneous and is based upon a misconception of the powers and duties of that board. In view of the fact that only a few pages of the briefs in that case were devoted to the discussion of this question, and that, as the writer recalls, but a short time was spent in oral argument, we have considered the learned and exhaustive arguments presented at this time and will endeavor to discuss them as succinctly as we may.

It is first contended that the state board does not possess power or jurisdiction to enter such an order or decree. It is argued that under the constitution the government of the state is divided into three distinct departments, the legislative, the executive, and judicial, and no person or collection of persons being one of these parties shall exercise any powers belonging to either of the others, except as heretofore expressly directed or permitted. The

same contention was first made in this court in the case of *Crawford Co. v. Hathaway*, 60 Neb. 754. The case was decided on another ground, but on this question, in the opinion by NORVAL, C. J., it is said: "It is conceded by appellant that any right it may have in the premises arises out of the irrigation act of 1895 (Comp. St. 1897, ch. 93a), and that without that act neither the appellant nor the numerous cross-petitioners have any right to the waters by them sought to be appropriated, unless the act of 1877 may have abrogated the common law rights of riparian owners, a question to which we will advert later. If this irrigation act of 1895 is valid and constitutional, the trial court properly refused to try and determine the right of priority between these litigants for the reason that the board of irrigation provided by that act is thereby given exclusive original jurisdiction to try those questions, and the same had not been by it heard or in anywise determined. Appellant admits the truth of this proposition, but seeks to avoid it by contending that that portion of the act which erects a board of irrigation, giving it exclusive judicial powers, is in derogation of section 1, art. VI of the constitution, in that the legislature by said act sought to erect a new judicial tribunal in place of one of the regularly constituted courts of the state. Without deciding that that portion of the act is unconstitutional, we will assume its invalidity for the purposes of this case, for a cursory examination of the act will convince any one that the board of irrigation was one of the inducements for its passage, and it is so interwoven with the whole act as to make it impossible to declare this portion thereof invalid without also effecting the destruction of the remainder of the act." On motion for rehearing an additional opinion was written by NORVAL, C. J., 61 Neb. 317. The opinion discusses, at length, at pages 325 to 328, inclusive, the question as to whether the act is unconstitutional for the reason that judicial powers are conferred upon the board. The writer, though evidently of the opinion that if the provisions with reference to the board fall the whole

act would fall with them, and implying, at least, that the act is valid, says the court expressly refused to decide this question because it "is not involved in the case at bar," and "it merely decides that, if the act in question is valid, plaintiff proceeded in the wrong forum." And it was said that, if unconstitutional with respect to the judicial powers of the board, it is void as a whole. A rehearing was had, and in an opinion prepared by HOLCOMB, J., the purpose of the act was stated more fully. 67 Neb. 325. It seems that the action was brought by the plaintiff below to have adjudicated the rights of 12 persons to the use of water flowing in the White river, and to enjoin Hall, a riparian owner, from interfering with the head-gates and works connected with an irrigating canal being constructed by the plaintiff. The trial court refused to try the case on its merits for the reason that the water rights of the respective parties had not first been determined by the state board of irrigation. This court took a different view as to the rights of riparian owners, and the judgment was reversed and the cause remanded, with directions to try the case. The opinion of Judge HOLCOMB, after considering the question at some length, says at page 367: "Powers of the same general nature and character are conferred upon almost every administrative body known to the statute, and regarding which it has frequently been decided are of a *quasi*-judicial nature, and yet such bodies are invariably held to be administrative, and to in no way conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. The state board of transportation, as heretofore organized in this state, the constitutionality of which has been invariably upheld when attacked, in all respects, save as to the manner of passing the law providing for its creation, is a fair illustration of the validity of legislation of this character. Numerous other boards and offices created by statutes, of an administrative character, and yet possessing powers of a *quasi*-judicial nature, might also be referred to if thought to

serve any useful purpose. For the reasons given, we are of the opinion that the sections of the act in question are not obnoxious to the constitution on the objections raised by counsel, and that the authority of the board of irrigation to make the determinations contemplated by the act, and the requirement of its approval as a condition to the right of appropriation under the provisions of the act, is a valid exercise of legislative power"—citing *Farm Investment Co. v. Carpenter*, 9 Wyo. 110. As to this point Judge SEDGWICK concurred, saying: "Those parts of the irrigation act of 1895 which provide for a board of irrigation, and the adoption of the rule of ownership of water by appropriation, are constitutional." In *McCook Irrigation & W. P. Co. v. Crews*, 70 Neb. 115, the constitutionality of the irrigation act of 1895 was again challenged, but the law was again sustained by the court.

In the face of these decisions it hardly seems necessary to again consider the question, but we have done so, and have examined further authorities. It is a matter of common knowledge that both in the administration of the laws of the United States and of the several states, boards or individuals, for the purpose of exercising executive or administrative functions, are often compelled to inquire into and determine questions requiring the exercise of powers judicial in their nature. Some of such determinations are often, by virtue of the statutes defining the functions and power of the tribunal, final and decisive, and others are made reviewable by appeal to the courts. For example, the determination of the general land office with respect to controversies over claims to the public lands; the action of boards of medical examiners in granting or refusing diplomas to persons seeking to practice medicine; the determination by boards of county commissioners in this state that the formation of a drainage district will be conducive to public health, or that the establishment of a highway is necessary; the judgment of a commission created by congress to pass upon the validity of private land claims in territory ceded to the United States. Number-

less other instances may be adduced. Whether reviewable by the courts or not, the exercise of such powers by tribunals of this nature has seldom been held to be a violation of the constitution in this respect. *McGehee, Due Process of Law*, 162, 368; *Reetz v. Michigan*, 188 U. S. 505; *Gardner v. Bonestell*, 180 U. S. 362; *Bates & Guild Co. v. Payne*, 194 U. S. 106; *People v. Simon*, 176 Ill. 165; *Farm Investment Co. v. Carpenter*, 9 Wyo. 110; *State v. Thorne*, 112 Wis. 81, 55 L. R. A. 956; *Gee Wo v. State*, 36 Neb. 241; *Lincoln Medical College v. Poynter*, 60 Neb. 228. We are satisfied with the conclusion reached by this court in the cases cited, which were followed in *Farmers Canal Co. v. Frank*, 72 Neb. 136, and see no reason to change our conclusion in this respect.

On the point that the action of the board in adjudicating priorities does not constitute due process of law for the reason that the statute does not specifically provide for notice to the parties, we are of opinion that where a statute under the police power of the state authorizes a proceeding affecting the property rights of any person, and does not expressly provide for notice to be given, the right to notice is implied, and that where a proper notice has been given, under a procedure authorized by the legislature, and a party has appeared, he has not been deprived of any of his rights without due process of law. And this is more especially the case where the proceedings are not in the nature of proceedings at law or in equity. The constitution and the statute will be construed together as one law. *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812, 835; *Paulsen v. Portland*, 149 U. S. 30; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 334. See, also, *McGehee, Due Process of Law*, 82, and cases cited in note to *Sterritt v. Young*, 4 L. R. A. n. s. 169 (14 Wyo. 146), beginning with page 173. Plaintiffs cite *McGavock v. City of Omaha*, 40 Neb. 64, to sustain their proposition. Although the writer of the opinion in that case seems to think that the authorities preponderate in favor of the view that notice must be prescribed in a statute in order

that it be valid, the court expressly confines the holding to the proposition that, if notice is not given in condemnation proceedings, the right to bring an action for damages is not barred. This case, therefore, is no authority in support of the proposition.

By the act of 1895 the legislature committed the duty of prescribing the method of procedure with respect to such adjudications to the state board. That board formulated rules providing for notice, and allowing for hearings and appeals. We think the legislature had power to delegate this duty to that body, and that the fact that the method of procedure was not embodied in the statute does not render due process lacking in the proceedings.

It is contended that the opinion of the secretary was void because it was in excess of the claim filed by the company. It is assumed by the plaintiffs that the "claim" adjudicated by the board was the affidavit filed by the Farmers Canal Company, but in this we think they are in serious error. The "claim" which the board investigated, and which the statute mentions, is "the claim for appropriation *now on record*" (section 16), and it is as to this claim, and other claims based upon actual use without posting, that "the method of determining the priority and amount of appropriations shall be determined by said state board." Moreover, in the 1889 report of the state board the method of adjudicating claims is set forth, and it is shown that the copies of notices posted and filed, transmitted by the county clerks, and the claims presented to the board by parties who neglected to post notices, but who had previous to 1895 appropriated and used water, constituted, according to its practice, the claims to be adjudicated. We are of opinion that, even if no blank claim affidavit had ever been filed by the company, as in fact none was filed until long after the hearing had been had, the board would still have had power and jurisdiction to determine the validity and priority of claims "now on record." The rules of the board clearly show that the affidavit filed by claimants under recorded notices was

intended to be taken as evidence, and not as a pleading. The opinion shows that "the claim * * * is made by virtue of posting three notices of appropriation at the proposed point of diversion," setting forth specifically the time of posting and recording each notice. The authorities cited to sustain the proposition that a judgment in excess of the claim made in the petition is void are, therefore, inapplicable, and the finding was not in excess of the claim made. In this connection plaintiffs' counsel say: "If we assume that the board had jurisdiction to hear and determine the claim of the Farmers Canal Company as against other claimants to the use of water from said river, then we are perfectly willing to concede that, *if the board made an adjudication that the Farmers Canal Company was entitled to an appropriation greater than it was possessed of at that time, it would be final*, provided that said company claimed an appropriation to the extent of its allowance by the state board, and other claimants had knowledge thereof; but we do not concede that, if a claimant only asks for an appropriation of 10 cubic feet of water, the state board has jurisdiction to grant to him 1,000 cubic feet of water; or, if he makes application for a permit to appropriate or claims an inchoate or incomplete appropriation, that the state board has jurisdiction to allow a completed appropriation." By this concession in the brief it would seem that plaintiffs themselves take the same view as this court did in the *Frank* case, since by the several notices, which were matters of public record of which the plaintiffs were charged with notice, the Farmers Canal Company claimed an amount of water greatly in excess of the allowance made to it by the state board. The fallacy in the argument of plaintiffs' counsel is that the posted and recorded claims, which under the statute were the basis and the moving cause for the action of the board, are treated as of no force or effect, and the claim affidavit subsequently filed is assumed to be a pleading by which the authority of the board is limited.

It is insisted that because the act of 1895 (section 19) provides that "when the adjudication of a stream shall have been completed it will be the duty of the state board to make and cause to be entered of record in its office an order determining and establishing the several priorities," etc., the action of the board upon the claim of the Farmers Canal Company was void, for the reason that the adjudication on the stream had not been completed when the opinion was filed and affirmed. It is shown, however, that hearings had been had upon all the claims to the water from the North Platte river; that the secretary proceeded to examine and render opinions upon each claim; that on January 7, 1897, opinions were rendered by him upon the claims of the Farmers Canal Company, and others, and from time to time opinions were rendered on other claims. On April 7, 1897, the opinions upon these and other claims, from which appeals were not taken, were affirmed by resolution of the board. A hearing was had as to the claims of several of the plaintiffs, and a subsequent resolution adopted on January 2, 1899, affirming the opinions rendered on rehearing. It would seem that, while the secretary filed his opinion on each claim as soon as he had reached a conclusion with regard to its validity and priority, the board itself took no action in the matter until the investigation was completed, when it affirmed the opinions *en masse*. The fact that rehearings were granted in a few cases could not operate to divest the board of the power it possessed and had already exercised. Even if the decision was premature, we are inclined to the view that it would be a mere irregularity, and not a void act.

Plaintiffs also argue that rule 3 of the board implies that the adjudication provided for was not intended to be final, because it provides that "the first adjudication of the rights of claimants shall be conducted for the purpose of determining the validity of claims," etc. This was what was actually done, that is, the validity of the claims, evidenced by the posted and recorded notices claiming water in specified quantities with priorities dating from the

posting and recording thereof, were actually determined, and, when this was done, no further adjudication upon this point could be had. It appears also from an examination of the entire body of rules that no other hearing or adjudication is provided for thereby, except in cases of contests or rehearings before the secretary or the board.

It is also contended that, because no certificate was issued within 30 days after the determination of the board, its adjudication was not final and there was nothing from which any of the parties could have appealed to the district court. The limitation of 30 days in which to issue the certificate we think is merely directory. The certificate required by the statute does not constitute the adjudication, but is merely evidence thereof.

It is next insisted that the language of the opinions themselves shows that they were not intended as final adjudications, that the board and its secretary followed the practice which seems to have prevailed in the courts of Colorado, by which in proceedings to settle water rights decrees may be rendered, both final and interlocutory in their nature; final and conclusive as to water which the court found had already been applied to a beneficial use, and conditional or interlocutory in that they recognized and declared the capacity of the canal and the quantity of water required for future use and decreed a right to the same; contingent upon the exercise of diligence in constructing the ditch and applying the water from the same to a beneficial use. It is not improbable that the board of irrigation had the Colorado practice in mind. There is no statute in this state authorizing such conditional decrees in a proceeding brought before the state board to ascertain and adjudicate priorities. The statutory duty of the board in this connection was to ascertain the rights which had become vested before the taking effect of the act of 1895 and the extent of such rights. Their powers were special and limited, and could not exceed the statutory grant. After the taking effect of the act of 1895, all water in the streams of the state, the right

to appropriate which had not already vested, could only be set apart to individuals by obtaining a permit from the state board under the manner of procedure specified in sections 28 to 31, inclusive, of the act. In so far, therefore, as the board attempted to make a conditional order in such a proceeding, its action was unauthorized and nugatory. But it is contended that the holding in the *Frank* case that the adjudication may be upheld with the *ultra vires* conditions eliminated is erroneous and should be set aside. In *Shaw v. Kellogg*, 170 U. S. 312, the controversy was one with respect to the title to a large tract of land in New Mexico; it being contended it was mineral land subject to entry. A congressional grant provided that the land should be selected by the grantees, and that it should be vacant and nonmineral. The land was settled by the claimants, and the selection reported to the land department by the surveyor general of New Mexico, whose duty it was to make the survey and see that the lands were such as the grantees were entitled to select. The land department approved the survey, field notes, and plat, and noted on its maps that the land had been segregated, but the certificate of approval entered upon the plat filed in the land department by the surveyor general, under the directions of that department, made the approval "subject to the conditions and provisions of section 6 of the act of congress, approved June 21, 1860." This is the act making the grant and providing that the land shall be "not mineral" in character. The court held that the limitation was beyond the power of the land department to impose, and that the title was valid and not affected by the limitation, saying: "What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the land department. Its duty was to decide and not to decline to decide, to execute and not to refuse to execute the will of congress. It could not deal

with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the land department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time." See, also, *Deffebach v. Hawke*, 115 U. S. 392, 406, where it is said: "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions it prescribed." By a parity of reasoning, the only authority which the state board had was to adjudicate the validity of the claims filed and determine their priority, under sections 15 to 27, inclusive, of the act. This being done, its powers and duties in the matter before it were ended, and it had no power to impose conditions, no application for unappropriated water being before it for consideration.

Much is said in the plaintiffs' briefs upon the proposition that the powers and duties of the board are administrative in character, and the point is sought to be made that controversies between rival appropriators are not within the scope of its powers and duties. This may be granted, and, yet, it cannot help the plaintiffs here. The board was authorized under the statute to fix a time for determining the claims of all persons to the waters of the North Platte river which had become vested prior to April, 1895. Notice was given of the time and place of

the hearing. All the parties to this suit or their predecessors in interest appeared. The board examined their claims, passed upon their validity, and fixed their priorities. This was absolutely essential for its own information in order that it might administer and distribute the unappropriated waters. By its rules it provided for the contest of claims made, and for a hearing upon the same, and for appeals from the decision of the secretary and board upon such contests. No contests being made as to the rights of any claimant, and no appeal being taken as to the amount and priority of appropriations, the matter became settled, so far as the board was concerned, and in its future dealings with the waters of the river it was bound to follow the adjudications made and distribute the same in accordance therewith. The supreme court of Wyoming in *Ryan v. Tutty*, 13 Wyo. 122, 78 Pac. 661, in passing upon the statute of that state, which grants powers to water commissioners and superintendents to regulate the use of waters by different appropriators according to their priorities, and provides that from the decision of such officers an appeal lies to the state engineer, and from his decision to the circuit court, while holding that a decision of the commissioner and superintendent as to the right or use of water, although not appealed from, is not an adjudication conclusive on the courts, say: "But it is to be observed that the statute clearly contemplates that such official action shall be based *upon a record of adjudicated priorities*. They (the officers) are not vested with arbitrary control, but are required to divide the water according to the prior rights of the interested parties. * * * Primarily, the commissioner is authorized, whenever legally called upon, and it is his duty, to see that the water of a particular stream is diverted *in accordance with the established priorities*, and to prevent any one from taking more water than he is entitled to take to the injury of others. He is not authorized to determine priorities. * * * The only object of his inquiry is that he may justly and fairly make a temporary distribution of

the water *in conformity with the adjudicated priorities.*" (The italics are ours.) It will be seen, therefore, that the question involved here is not decided in that case adversely to the views of this court, though it is cited by plaintiffs as upholding their contention. *Boulder & Left Hand Ditch Co. v. Hoover*, 48 Colo. 343, 110 Pac. 75. The same principle was announced by this court in *Farmers & Merchants Irrigation Co. v. Cozad Irrigation Co.*, 65 Neb. 3.

In considering whether the appropriation had been lost by lack of diligence, by nonuser or abandonment these facts must be considered. The stipulation shows that prior to June 1, 1893, about \$96,000 had been expended upon the canal. It was then of sufficient capacity to irrigate 30,000 acres of land within a distance of 19 miles from the headgate. The 25 miles below the 19 miles mentioned had been opened up at various places to a full depth, and nearly one-fourth of the construction work performed, but had not been connected up with the 19-mile section in which water was flowing. The canal was kept in repair until in 1898 by the Farmers Canal Company, and thereafter by landowners along the canal with the consent of that company, until it was taken possession of by the Tri-State Land Company. Up to the time of the foreclosure of the trust deed the company endeavored to sell additional bonds or to exchange them with different contractors for the purpose of extending and finishing the canal. The action to foreclose the trust deed securing the bonds was commenced in 1898, on December 23, 1901, the property was sold, and the sale was confirmed in February, 1902. On April 14, 1902, Frank filed his claim, which, if allowed, would have destroyed the appropriation except for water sufficient to irrigate 5,000 acres. This was followed by the claim and intervention of the Farmers Irrigation District, which, if allowed, would have had the same effect. Protests against Frank's application were filed on behalf of Roberts Walker claiming the prior appropriation. These proceedings before the board and by

appeal to the district and supreme courts continued until November 18, 1904, when they were terminated by the judgment of the district court in pursuance of the mandate. This recites: "The findings and jurisdiction of the state board of irrigation, in so far as it finds the said Roberts Walker as the successor in interest of the Farmers Canal Company entitled to an amount of water from the North Platte river not to exceed 1,142 6-7 cubic feet per second of time, is hereby ratified and affirmed." And it was adjudged that Roberts Walker "has appropriated and is entitled to divert from the North Platte river for irrigation purposes 1,142 6-7 cubic feet of water per second of time, and has a vested, subsisting right in and to said appropriation." The Tri-State Company was organized in January, 1904. In February, 1904, it made a contract with Roberts Walker to purchase the Canal Company's property, the amount to be paid depending upon the result of the litigation. Relying upon the judgment, the Tri-State Company paid the full amount stipulated for the rights of Roberts Walker, and received a conveyance of the property, which was recorded on February 21, 1905, in the office of the register of deeds in Scott's Bluff county. It immediately began the enlargement and construction of the canal, expending over \$100,000 that year. It pursued this work in 1906, and diligently and actively prosecuted the work until its completion, so that the canal is now capable of furnishing water for the entire 80,000 acres of land which it was constructed to serve. On September 13, 1906, it made an application to the state board for leave to construct a needle dam across the river below the headgate of its canal. That it had a valid existing right was recognized by the state board at that time, when it granted leave to construct a needle dam in the river below its headgate for the purpose of diverting sufficient water into its canal, and this right has been since recognized by that body in its administration of water from the river.

It seems evident that the purpose to carry on the enter-

prise and construct the canal in its entirety was never abandoned by the owners, and it has now been carried to completion. It is probably true that no actual construction work was performed upon the canal for about 10 years; but, from the time that the foreclosure suit was begun until the final decision in the *Frank* case, the title to the property and right to the appropriation were in such hazardous and uncertain condition that few men would have had the temerity to invest money to any extent in the further development of the plan. The enterprise was of such a nature as to require large expenditures and years of effort. While recognizing the rule that in the final analysis it is the application of water to a beneficial use within a reasonable time that conditions the power of the appropriator to retain his right to carry water, and that an appropriator of water to be carried to be used by others must carry on his works with diligence or lose his priority, we are convinced that, under all the facts in this case, it would be highly inequitable and unjust at this time to enforce a forfeiture on the ground of lack of diligence, nonuser or abandonment. We are aware that it has been said that pecuniary difficulties are no excuse for failure to carry on such work, but an examination of the cases in which this doctrine has been laid down shows that the facts are so dissimilar from the case at bar that we do not feel justified in adopting them as forceful authority in this case. This precise question may never arise again in this state, for by an amendment made in 1911 to section 18, ch. 93a, Comp. St., a time is specifically limited for the application of water, and a method of procedure established by which the question of nonuser or lack of diligence is determined.

Upon the question whether, even if the other questions be decided in favor of plaintiffs and against defendants, plaintiffs are entitled to the aid of a court of equity and are not estopped by reason of their own conduct, it is necessary to examine the facts as admitted by the pleadings and the evidence. All parties who took any part in

the hearing knew, or were charged with knowledge, that notices had been posted by the Farmers Canal Company and recorded in the office of the county clerk prior to the taking effect of the act of 1895. The act of 1889, by authorizing such filing and recording, constituted the same a public record, of which all persons interested were bound to take notice. These notices showed that the Farmers Canal Company, by the first, claimed a quantity of water sufficient to fill a canal 40 feet wide on the bottom and to carry water to a depth of 4 feet, and, by the others, water in addition to its former claim to the amount of 200,000 miner's inches, the canal to be 80 feet wide and 8.84 feet deep at point of divergence, slope 1 to 1, with an average grade not greater than 2 feet to the mile. Under section 32 of the act of 1895, 50 miner's inches shall be deemed equivalent to a cubic foot of water per second, so that in the aggregate the waters claimed largely exceeded in quantity the 1,142 6-7 cubic feet per second which were allowed. Indeed, we find no specific denial of this knowledge either in the pleadings or the evidence. After denying knowledge of the filing of the claim of the Farmers Canal Company with the board, of the hearing thereon, and of the opinion and resolution, the petition alleges: "Nor did the plaintiff herein or its grantor acquire any knowledge whatever of *the above mentioned transactions of said board* and its secretary for several years after they had taken place." This is not a negation of knowledge of the claims of the Farmers Canal Company, but only of knowledge of the transactions of the board. It also amounts to an admission that it acquired knowledge "several years after" 1896 and 1897, when the transactions mentioned took place. The expression "several years after" is vague and indefinite, and, since the language used must be construed most strongly against the pleader, it cannot we think be taken to mean a space of about nine years from July, 1896, when the hearing was had, and January, 1897, when the resolution passed, and the time when the defendants began the work of recon-

struction and enlargement on a large scale in August, 1905. So that there is no denial of want of knowledge even of the board's action before the latter time.

The petition alleges that the defendants "have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte river to the extent of 1,142 6-7 cubic feet per second of time * * * which is prior to the right of appropriation acquired by this plaintiff." The time at which these declarations were made is not disclosed. But, if only recently made, the pleader would, no doubt, have taken advantage of the fact. The evidence also shows the mailing of notices and of printed rules of procedure to the plaintiffs, and that at different dates from June 24 to October, 1895, the plaintiff's grantor and ten other claimants, including the Farmers Canal Company, filed claims before the state board, and that on July 17, 1896, another claim was filed by the owners of the Minatare ditch. On the same day that the opinion on Farmers Canal Company was filed by the secretary, he also filed opinions in the claim of the Enterprise Ditch Company, plaintiff's grantor, and in those of three of the other plaintiffs. It is apparent, therefore, that all claimants who filed claims with or produced evidence before the board had notice of its transactions, at least to the extent of being aware that a hearing would be had, and were also charged with notice of the rules of practice adopted by the board. The evidence also shows that some rehearings, presumably on request, were had upon claims. In April, 1902, the Frank application was filed with the state board. In June, 1902, the Farmers Irrigation District also filed a like application. These applications were contested before the board, appeal was taken to the district court and supreme court. Judgment was rendered on June 9, 1904, in favor of the Farmers Canal Company upholding its prior right to the appropriation it claims. In 1905 the Tri-State Land Company expended \$133,066.46 in their work on the canal. In August, 1906, it began work on the

enlargement of the 19-mile portion of the canal. In the spring of 1907 the canal was constructed to its full size for a distance of 40 miles below the headgate. In September, 1906, it was given leave by the state board to construct a needle dam across the river below the headgate, and this work was begun in October of that year. In all there was expended in 1906 in these operations the sum of \$499,491.87. In 1907 a new headgate was built and the canal further extended at an aggregate cost of \$323,386.87. In 1908 the work was continued at a cost of \$52,410.67. In 1909 \$464,535.13 was expended in extension and improvement. In 1910 work was continued on the headgates, needle dam, and waste gate at a total cost of \$198,529.70. The total amount expended by the Tri-State Company in construction from February, 1905, to October 31, 1910, was \$1,651,138.41, of which amount over \$950,000 was expended before the original petition in this case was filed.

The question is whether the plaintiffs could stand idly by while the defendants, openly claiming a prior right to water sufficient to water the lands for which the appropriation had been allowed by the state board, expended nearly a million dollars in the work, and then after the work was practically finished enjoin the use of the water which the works were constructed to carry. Under section 10 of the act of 1895, the state board is required to prepare and render to the governor biennially full reports touching all the matters and duties devolving upon the board by virtue of its office, and it is provided that 2,000 copies of the report should be printed and distributed according to the provision of the law providing for the printing of other state reports. This report is a public document of which we take judicial notice. The report for the years 1897 and 1898 contains a table showing the appropriations from the various streams of the state which had been allowed by the board since its organization in 1895, with the date of priority, and the amount adjudged to each appropriator. This table shows

that the Farmers Canal Company of Omaha had been granted an appropriation of 1,142.87 second feet, with headgate located on section 3, town 2, range 58, Scott's Bluff county, with priority of September 16, 1887, with the conditions mentioned, and also shows the amount and priorities awarded other parties to this suit. This table is carried forward in each report published, so that the information therein contained has been available to all parties interested ever since early in the year 1900 until the present time. With all these facts before us, we must find that plaintiffs had knowledge of the posted and recorded claims of the Farmers Canal Company; of the passage of the law of 1895, and of its provisions requiring the state board at its first meeting to make arrangements for adjudicating the priorities of all "claims for appropriation now on record;" of the notice to appear before the secretary, and of the rules prescribed by the board as to rehearing, appeals, and contents; of the practice of the board in deciding claims by written opinions, copies of which were mailed to each claimant; of the fact admitted in its reply that ever since the Tri-State Land Company became the owner of the canal, "it claimed and still claims the right to 1,142 6-7 cubic feet per second;" of the vast undertaking of the defendants in the completion of the canal; of the extensive works of the Tri-State Company in building dams and headgates, and in excavation, comparable only to the construction of a railroad; and of the expenditure of hundreds of thousands of dollars in a sparsely settled country. Furthermore, the claims of all the parties except two originated by posting notices on the bank of the stream and recording copies in the office of the county clerk. When the state sought to determine for its own purposes the rights to the use of water which had vested, so that it might apportion that which still flowed in the river bed subject to appropriation, it gave all of these claimants an equal opportunity to assert their claims. They all took advantage of this privilege, their rights were determined, and they all

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acquiesced. Opportunity for contests of the claims of others which might interfere with the amount of water each claimed was afforded each of them under the rules adopted which were brought to their attention. They filed no contests, took no appeals, but remained apparently content to recognize the authority of the board. Relying on these conditions, as well as upon the adjudication, the defendants purchased the canal, worked upon it for years, and spent vast sums of money in its completion so as to irrigate the specific land which it was originally designated to reclaim. During all these years no claim of superior right to this water seems to have been made, though it must be said that, when the supply was short and while the defendants were not using the water, it was used by some of the plaintiffs, but this is customary, right and proper when water is flowing in the stream unused. If a prior appropriator for carriage is not ready to use water, the use of it by another is not equivalent to an adverse user which of itself would give notice of a hostile claim. *Smith v. Duff*, 39 Mont. 374, 102 Pac. 981; *Featherman v. Hennessy*, 42 Mont. 535, 113 Pac. 751; *Ison v. Sturgill*, 57 Or. 109, 109 Pac. 579; *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143. Under these circumstances, and having this knowledge, it would be contrary to the plainest principles of equity if plaintiffs might stand silently by, seeing the defendants engage in such a monumental work under claim of right, and utter no word of warning as to their own claims, which, if eventually established, would deprive defendants of the water which the canal was built to carry, condemn the whole enterprise to failure, and result in the absolute loss of the money expended. It would be manifestly inequitable and unjust to allow the plaintiffs, after the works were practically finished and the money expended, to insist upon claims which, had they been asserted in good time, would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined.

In *Fremont Ferry & Bridge Co. v. Dodge County*, 6 Neb. 18, the facts were that the company sought to enjoin the county from erecting a bridge which would take away tolls from a bridge built by plaintiffs. It was shown by the answer that a bridge had been erected by the county, a part of which was out of repair, and which it was about to repair. The court said: "The silence of the plaintiff when knowing its own rights, and having full knowledge of the steps taken by the defendants to build the bridge, will estop it after the completion of the work, or after large expenditures of money in construction had been made; for such silence lulls to rest instead of warning to danger, and, in the language of the books, it becomes a fraud." In a case where a mill owner entitled to the use of water as a riparian owner remained quiescent while an irrigation company expended large sums in constructing its canal, this court refused to grant an injunction against the use of the water for irrigation, saying: "It is clearly established by the proofs that the construction of the irrigating ditch was undertaken and carried out by the defendant company in good faith in accordance with the purpose of its creation, at a cost of many thousands of dollars, and in the belief on the part of its promoters and managing officers that it was entitled to divert the water of the Republican river. It is also practically undisputed that the plaintiff was from the first fully advised of both the undertaking and the purpose of the defendant, and it is certain that he interposed no objection thereto until after the substantial completion of the work. The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact there is no principle more firmly established in the jurisprudence of this country than that a suitor who has by his laches made it impossible to restrain the completion or use of public works without great injury to his adversary or the public will be left to pursue his ordinary legal remedies." *Clark v.*

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Cambridge & Arapahoe I. & I. Co., 45 Neb. 798. See, also, cases cited in each of these opinions. *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. Rep. 592. We think the cases cited by plaintiffs are so different in the facts before the court that they do not furnish any guide in this case. Whether the original adjudication was more than a mere administrative proceeding for the information of the board or not, and even if it should be held that the right to the full appropriation was lost by nonuser before the Tri-State Land Company fully constructed its canal, we agree that the plaintiffs are estopped to maintain this action.

In concluding, we may remark that the evidence shows that at the time the state board made the determinations agriculture by irrigation was in its infancy in this state. The volume of water flowing in the North Platte river at various seasons of the year had not been definitely ascertained, and the actual flow was largely a matter of conjecture. A number of the determinations made, therefore, were for water in excess of the actual amount which experience has shown was available for the respective enterprises and which the works could convey. Perhaps this fact should be considered by the state board in times of scarcity, but this question was not presented, and is not decided. The true test of ultimate right to the water is its actual application to a beneficial use. The spirit and the letter of the statute compels the most rigid economy in the use of water so that the full benefit of it may be derived. If not in use by prior appropriators, others may use it. No dog in the manger policy can apply. If the nonuse is continued for the statutory time the right ceases, may be forfeited, as the statute provides, and more diligent users may acquire the right to its use under the authority of the board. A landowner taking more than he is entitled to is liable in damages to those injured. No appropriator is entitled to more than can be beneficially used, or more than the least amount which experience indicates is necessary for the production of crops in the exercise of good husbandry.

We find it unnecessary to consider the questions presented as to the rights of the plaintiffs and cross-petitioners between each other, since the result reached eliminates the same.

The judgment of the district court is reversed and the cause dismissed, but without prejudice as to any controversy between the plaintiffs and cross-petitioners.

REVERSED AND DISMISSED.

HAMER, J., concurring in part, and dissenting in part.

I concur in the opinion so far as it reverses the judgment of the district court, and no further. I am unwilling to adopt the views expressed in the opinion, and dissent from them. I am unwilling that the case shall be dismissed, and dissent from so much of the opinion as directs its dismissal. Only that amount of water should be adjudged to the main ditch which can be applied to a beneficial use. The amount of water applied should be with due regard to the rights of other appropriators, and where the first appropriator fails to apply all the water within the limits of his appropriation to a beneficial use, and there is an excess of water which is not applied, the same shall be for the use of the next appropriator in the order of priority, and there should be no appropriation except for an actual beneficial use. The ditch should not be held entitled to appropriate water over and above that which is intended for an immediate beneficial use, and water not so diverted and used should belong to the next appropriators in order of priority. As between ditches, there should be a *pro rata* distribution of water based upon the amount each ditch has lawfully appropriated and applied to a beneficial use, and not exceeding the limit of each appropriation.

ROBERT B. DUNCAN, ADMINISTRATOR, APPELLEE, v. NEBRASKA SANITARIUM & BENEVOLENT ASSOCIATION, APPELLANT.

FILED OCTOBER 18, 1912. No. 17,086.

1. **Charities: HOSPITALS: LIABILITY: NEGLIGENCE OF NURSES.** A charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses.
2. ———: ———: ———: ———. A charitable institution conducting a hospital does not, by accepting compensation from a patient who is able to pay for room, board and care, incur liability to such patient for the negligence of nurses.
3. ———: ———: ———: ———. A charitable institution conducting a hospital for benevolent purposes alone does not necessarily incur liability in damages for the death of an insane patient who committed suicide when alone in a room, though pay for the patient's room and care was accepted under an oral agreement to keep a nurse in constant attendance.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed.*

John M. Stewart and T. F. A. Williams, for appellant.

Charles O. Whedon and O. P. Peterson, contra.

ROSE, J.

When Sadie Duncan was occupying a room in defendant's hospital, she committed suicide in absence of a nurse or other attendant, and this is an action by her husband as administrator of her estate to recover from defendant damages for negligently causing her death. Plaintiff alleges that, in consideration of \$45 a week, she was accepted as an inmate under a verbal agreement by defendant to give her necessary medical attention and to furnish a trained nurse to be in constant attendance upon her. In the petition it is also alleged that her death was

due solely to the wrongful act, neglect, default and carelessness of defendant in leaving her alone and unattended. The right of plaintiff to a recovery was resisted on the ground that defendant is exempt from liability to its inmates for the negligence of nurses and other attendants, because it is a charitable institution, conducted solely for philanthropic and benevolent purposes. From a judgment in favor of plaintiff for \$3,275, defendant has appealed.

After giving a number of instructions the trial court charged the jury as follows: "The undisputed evidence further shows that the defendant is a charitable institution maintained for philanthropic and charitable and benevolent purposes, and in no manner directly or indirectly for private profit or dividend-paying to any one." This instruction was fully justified by the evidence, and was properly given. In stating the law applicable, however, the trial court said: "You are instructed that if you find from the evidence that said Sadie Duncan was in any sense a charitable patient, or, in other words, a beneficiary of any bounty at the hands of the defendant, and the amount paid does not make full pecuniary compensation for the services rendered, then the deceased's representative, the plaintiff herein, cannot recover, and your verdict must be for the defendant. On the other hand, if you find from the evidence that the deceased was received as a patient on full pay, full pecuniary compensation, and without being the recipient of any charity or bounty at the hands of the defendant, then the defendant would be liable for any negligence of its agents or servants which proximately contributed to the deceased's death."

This instruction is assailed as erroneous. It contains two propositions of law, and the first seems to be correct. It is a well-established doctrine that a charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses. Some courts say that one accepting the

benefits of such a charity exempts his benefactor from liability for the negligent acts of servants. Others assert that non-liability is based on the ground that trust funds created for benevolent purposes should not be diverted therefrom to pay damages arising from the torts of servants. Exemption from liability is frequently sanctioned on the ground that public policy encourages the support and maintenance of charitable institutions and protects their funds from the maw of litigation. While there is a diversity of opinion as to the reasons for the rule, the doctrine itself is firmly established. *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L. R. A. n. s. 486; *Farrigan v. Pevear*, 193 Mass. 147, 7 L. R. A. n. s. 481; *Powers v. Massachusetts Homœopathic Hospital*, 101 Fed. 896, 65 L. R. A. 372; *Downes v. Harper Hospital*, 101 Mich. 555; *Parks v. Northwestern University*, 121 Ill. App. 512, 218 Ill. 381; *Joel v. Woman's Hospital*, 89 Hun (N. Y.) 73; *Ward v. St. Vincent's Hospital*, 50 N. Y. Supp. 466; *Conner v. Sisters of Poor*, 7 Ohio N. P. 514; *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351; *Adams v. University Hospital*, 122 Mo. App. 675; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L. R. A. 224. In applying the law thus established the trial court was right.

The second proposition stated in the instruction last quoted, however, is erroneous. It permits the jury to find in favor of plaintiff, if full compensation was paid to defendant. The uncontradicted evidence is that the agreed rate as pleaded by plaintiff was not paid. On the contrary, a reduced rate was paid and accepted. Even if full compensation had been paid, it would not necessarily follow that the patient received no benefit from charity. She occupied a room in a building maintained in part at least by donated funds intended for benevolent purposes. Necessary care, skill and food came from the same source. On the record as made, the jury should not have been permitted to find that the inmate had received no benefit from charity. A charitable institution

conducting a hospital does not, by accepting compensation from a patient who is able to pay for room, board and care, incur liability to such patient for the negligence of nurses. *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 33 L. R. A. n. s. 141; *Cunningham v. The Sheltering Arms*, 135 App. Div. (N. Y.) 178; *Gable v. Sisters of St. Francis*, 227 Pa. St. 254; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; *Powers v. Massachusetts Homœopathic Hospital*, 101 Fed. 896; 65 L. R. A. 372; *Downes v. Harper Hospital*, 101 Mich. 555; *Parks v. Northwestern University*, 121 Ill. App. 512, 218 Ill. 381; *Ward v. St. Vincent's Hospital*, 50 N. Y. Supp. 466; *Conner v. Sisters of Poor*, 7 Ohio N. P. 514; *Taylor v. Protestant Hospital Ass'n*, 85 Ohio St. 90. Money accepted from patients who are able to pay it does not go to persons who may be trustees, directors, founders, or incorporators of the institution, and is not a source of pecuniary gain to private individuals, but is devoted to the general purposes of the charity.

To justify the recovery, plaintiff ably argues that defendant is liable for damages because, for a valuable consideration, it entered into a verbal contract to keep a nurse in constant attendance upon the inmate, because that duty rested on defendant itself and could not be delegated to servants, because the agreement was violated and because the negligent breach of the contract resulted in the death of the inmate. The right to recover damages for the causing of death by a wrongful act is created by statute. Comp. St. 1911, ch. 21, secs. 1, 2. It is based on tort, and not on contract. It does not exist independently of statute. A charitable institution conducting a hospital for benevolent purposes alone does not necessarily incur liability in damages for the death of an insane patient who committed suicide when alone in a room, though pay for the patient's room and care was accepted under an oral agreement to keep a nurse in constant attendance. *Downes v. Harper Hospital*, 101 Mich. 555; *Taylor v. Protestant Hospital Ass'n*, 85 Ohio

Duncan v. National Extermination & Remedy Co., Inc.

85 500; *Lewis Adm'r v. Taylor Coal Co.*, 112 Ky. 545, 66 S. W. 1044; *Duncan v. St. Luke's Hospital*, 38 N. Y. Supp. 597. The report of the last case cited shows that an insane woman was kept in a hospital under contract to keep a guard in constant attendance for \$7 a day, that the agreement was violated, and that, in absence of a guard, the inmate killed herself. The facts were fully pleaded. The existence and violation of contractual obligations were invoked to sustain a cause of action. In the opinion it was said: "The contract was to keep a constant watch and guard. It was not to prevent the unfortunate patient from committing suicide. Nor could it fairly be held to be within the reasonable intendment of this contract that the hospital agreed to pay to the husband the value of his wife's life to him in case she did commit suicide. There has been no case cited to us, nor have we been able to find one, which allows a recovery upon such a complaint or such a state of facts. Nor can we see any reason why there should be any difference in the rule where the tortious act which caused death is alleged to be a breach of an express contract than where it is alleged to be a breach of an implied contract, or where no contractual relation at all existed."

This reasoning is applicable to the present case. In permitting the jury to find in favor of plaintiff, if defendant received full compensation, the trial court was in error. As the case stood when submitted to the jury, there should have been a peremptory instruction for defendant. The judgment is therefore reversed and the cause remanded.

REVERSED.

LERTON, J.

I concur in the result on the ground that full payment for service is not the test of liability, and the instruction to that effect is erroneous.

NELS PETERSON, APPELLEE, v. LINCOLN COUNTY; ALBERT JOHNSON, INTERVENER, APPELLANT.

FILED OCTOBER 18, 1912. No. 16,731.

1. **Appeal: AMENDMENT.** Under section 144 of the code, power is given the court to conform the pleadings to the proof, in an appellate court, only "when the amendment does not change substantially the claim or defense."
2. ———: ———. The power of the supreme court to permit an amendment of a pleading to conform to the proof is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice.
3. ———: **AFFIRMANCE.** The record examined, and held that the decree of the district court is sustained by the pleadings and proof upon which it was based.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. Affirmed.

John A. Sheean and Halleck F. Rose, for appellant.

E. H. Evans, L. E. Roach and Hoagland & Hoagland, contra.

FAWCETT, J.

This suit was instituted in the district court for Lincoln county to quiet plaintiff's title to certain lands in that county, described in plaintiff's petition. Defendant William Robb was holding as grantee of the defendant county, under a title obtained in a tax foreclosure proceeding which was void by reason of the fact that in such proceeding service was had by publication upon the then record owner as a nonresident, when in fact he was an actual resident of this state. Albert Johnson, whom we will hereinafter designate as defendant, intervened, and as an answer and cross-petition to plaintiff's petition alleged, substantially, that he purchased the land in con-

JAMES C. LAMAR, JR.

On May 1, 1908, the plaintiff came to defendant five days before the expiration of the time for payment of a back of taxes and offered to buy the land on account of a lack of funds and to pay the taxes on the same. The crops were so well and the plaintiff moved off without paying any rent and defendant being made to obtain a note, was made to procure the money with which to pay taxes; that a few days thereafter plaintiff returned to Sanders county where defendant resided and represented to defendant that the land was valuable and offered him not to attempt to remove the same, that defendant had no further knowledge or information concerning the land and, about a month prior to filing his answer and cross-petition, defendant believed the land to be valuable and was worth the taxes assessed against it; that some time prior to March 6, 1909, plaintiff made a trip to Lincoln county, visited the land and saw that said county was enjoying a heavy annual rainfall; that good crops were being raised, and that the land was worth the sum of \$2,000; that upon his return from Lincoln county he asked defendant if he still owned the land, and, upon receiving an affirmative answer, suggested that he was going back to Lincoln county and would look up the land in controversy, at the same time informing this defendant that he understood land was picking up a little, and, if it was worth the taxes against it, he would make this defendant an offer on it; that at that time plaintiff was fully aware of the value of the land, but, in order to mislead and defraud defendant, led defendant to believe that he knew nothing of it; that a short time thereafter he came to defendant and represented that he was intending to move out to Lincoln county and take "a bunch of horses" with him; that he would need some place for them to run in, and that under those conditions he believed he could afford to pay off the taxes on the land and give defendant \$100 for a deed to the same; that it was risky to pay that much for it; that perhaps it would be impossible to redeem, but, as he needed a place to run his horses, he would do it; that defendant asked time to think it over,

but plaintiff insisted that unless he could make the deal at once he would not buy; that he was buying only because he was moving out and wanted the land to run his horses on; that defendant had not seen the property since 1893, was not aware of the changed climatic conditions, believed the land was valueless; relied upon the assertions of plaintiff, and, being financially unable to make the trip out to see the land, and not being able financially to redeem the taxes, he agreed to accept the sum of \$100 for the deed, which he executed on March 6, 1909; that the representations of plaintiff were false and known to be false when made; that the same were falsely and fraudulently made for the purpose of misleading the defendant and causing him to convey a valuable right for practically nothing; that the land was well worth \$2,500 in excess of the taxes and assessments, and that defendant Robb had no valid title to said property, all of which was well known by plaintiff. Defendant then tenders plaintiff a return of \$100 received by him for the deed, ending with a prayer that defendant Robb take nothing, and that the deed from defendant and his wife to plaintiff be canceled, and that his title be quieted.

For reply to the answer and for answer to the cross-petition of defendant Johnson, plaintiff traversed the allegations in such answer and cross-petition with general and specific denials, and alleged that by the deed of March 6 he purchased whatever unlitigated equity defendant had in the premises; that at that time defendant Robb was claiming to be the owner, was in possession under the proceedings referred to, was denying that Johnson had any right or title or any right of redemption; that, while plaintiff believed that Johnson had an equity in the premises and the right of redemption, yet such rights of Johnson could only be enforced by extended litigation in the courts; that prior to the execution and delivery of the deed plaintiff fully informed defendant, both by himself and his agent, L. E. Roach, as to the full rights that said Johnson had in the premises; that Johnson was fully in-

formed that plaintiff and his attorney believed that he, Johnson, could enforce his title to said premises, and, after being fully informed as to all of the facts and circumstances, defendant, without any misrepresentation or concealment of any kind on the part of plaintiff, made the contract and executed and delivered the deed; that the deed was not made and executed until after Johnson had fully considered the matter for several weeks and had made investigation as to his interest and rights in the premises; that, after plaintiff had instituted this suit, Johnson for a time assisted him in the prosecution of the same, and that, with full knowledge of all of the facts, Johnson never complained to plaintiff in any manner with reference to his contract or deed until his answer and cross-petition was filed in this suit; that Johnson had not tendered to plaintiff any part of the moneys which plaintiff had paid for the deed, and had not offered to reimburse plaintiff for any portion of his expenses and liabilities which he had incurred with reference to the premises.

The district court found that the tax foreclosure proceeding was void and vested no title in defendants Robb; that they were entitled to nothing more than the return of the money which they had paid to the defendant county, and for subsequent taxes, with interest and penalties, which sum the court found to be \$215. The court further found upon the issues joined between plaintiff and Johnson that for about 30 days prior to the making of the deed in controversy Johnson had knowledge of the condition of the property and title, and had every opportunity to make investigation concerning the same; that there were no fiduciary relations existing between Peterson and Johnson with reference to said transaction, found the issues in favor of Peterson as against Johnson, and dismissed the petition of intervention. From this decree defendant Johnson, alone, has appealed, and the only question for our consideration is the one presented by his cross-petition, viz., his right to have his deed to plaintiff set aside upon the grounds alleged in his answer and cross-petition

above set out. Plaintiff filed a motion to dismiss the appeal for various reason set out in his motion. As the case must be affirmed upon the record, we have not considered the merits of this motion, but overrule the same *pro forma*.

While not expressly, it is practically conceded in the briefs of counsel for defendant that upon the pleadings above outlined, and the evidence, the decree of the trial court cannot be disturbed. They seek to avoid this disastrous result by now tendering and asking leave to file in this court an amended answer and cross-petition "to conform to the proofs adduced upon the trial in the district court," in which, in addition to what was alleged in their original answer and cross-petition, they alleged that plaintiff and L. E. Roach, a practicing attorney at North Platte, entered into a collusive agreement to defraud defendant out of his land, worth, as they alleged, over \$3,000, for the mere pittance of \$100; that in furtherance of such collusive agreement plaintiff induced defendant to write to Roach for information respecting his land and legal rights, and to employ him as defendant's attorney in that behalf; that Roach accepted the retainer, but, in violation of his duty as such attorney, he concealed from defendant all information as to the value of the lands, and entered into a collusive agreement with plaintiff to assist plaintiff in obtaining title thereto for a pittance, in which event plaintiff and Roach were to divide the profits made from such transaction. Plaintiff vigorously assails the right of defendant to file such amendment, upon the ground that it constitutes a material change of defendant's claim or defense, and, if permissible at all, the leave should have been sought and obtained in the trial court; that, while an appellate court may, and occasionally does, permit the amendment of pleadings to conform to the proofs, for the purpose of sustaining a judgment of an inferior court, it never permits such amendment for the purpose of reversing a judgment.

Defendant made no request in the court below, either

before or after judgment, for leave to file this amended pleading. The decree recites: "This cause came on for trial before the court upon the petition of the plaintiff, the answer of the defendant Robb, and reply of the plaintiff, and upon the answer and cross-petition of the intervener, Albert Johnson, and the answer of plaintiff to cross-petition of the intervener, Albert Johnson, and reply of intervener, Albert Johnson, and the evidence, and this cause is submitted to the court upon the pleadings and evidence, and the cause is taken by the court under advisement." Four days later the court made its findings and entered the decree. These recitals clearly advised counsel that the court was basing its decree upon the pleadings then on file, and, if after the decree was entered, any amendment of the pleadings was deemed necessary, or desired, the trial court was entitled to be advised thereof, so that it might correct its decree, if such amendment made a correction necessary. It would be sanctioning a very loose practice and be unfair to the trial court to permit an amendment here under such circumstances. Section 144 of the code is relied upon by defendant, but we do not think it is sufficient to entitle him to the relief now sought. The section provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." That the amendment tendered "substantially" changes "the claim or defense" of defendant is clear. This provision of the code is found substantially in this same form in most, if not all, of the states in the Union, and, so far as we have observed, it is construed liberally when relief under it is sought in the trial court, but when appealed to in an appellate court it is construed

much more strictly. As said in Boone, Code Pleading, sec. 234: "Amendments after trial are very cautiously allowed, and the general rule is that a party who has not sought to amend until after he has been nonsuited is too late to ask for a new trial and an amendment." The proposition thus stated is in accord with the views of other writers, and has received our approval in *Scott v. Spencer*, 44 Neb. 93.

Upon the point under consideration, section 723 of the New York code is identical with our section 144. In *Alden v. Clark*, 86 Hun (N. Y.) 357, the first paragraph of the syllabus holds: "Under the provisions of section 723 of the code of civil procedure, power is given the court to conform the pleadings to the proof only in a case 'where the amendment does not change substantially the claim or defense.'" In the opinion it is said: "By section 723 of the code of civil procedure power is only given to conform the pleadings to the proof in a case 'where the amendment does not change substantially the claim or defense.' Apparently, under the evidence given, Clark claimed that he had through his purchase from Butler an absolute title to the safe. As his answer stood, it was insufficient as a defense. The amendment sought, if it amounted to anything, would substantially change the defense set up in the pleading and so would not be admissible." In *Fitch v. Mayor*, 88 N. Y. 500, it is said: "As the case stood before the trial court, it was its duty to dismiss the complaint, for the alleged cause of action had not been made out. It is not necessary to restate the grounds of this conclusion, for in regard to them we concur with the learned court below. The appellant, however, desires us to amend the complaint so that the plaintiff shall be designated as 'record clerk of the court of special sessions,' and supposes that this may be done under section 723 of the code of civil procedure. If the section applies to this court, the power should not be exercised unless it is plain that no substantial right of the adverse party would be affected. Here the case has been

tried upon a different issue, and without amendment disposed of by the general term. The application should have been to that court, or the trial court." We concur in the holdings in the two cases cited, and, for the reasons therein given, we hold that defendant's application is not within the scope of section 144; that the proposed amendment clearly changes the claim or defense of defendant; that the application should have been made in the district court, and cannot be allowed here.

The reason assigned by plaintiff why the amendment should not be permitted in this court, viz., that this court will in a proper case permit an amendment to conform a pleading to the proofs for the purpose of sustaining a judgment, but will never grant such permission to defeat a judgment, is also fatal to defendant's right to this amendment. We turn again to the New York decisions. In *McGinniss v. Mayor*, 6 Daly (N. Y.) 416, it is said: "No motion was made on the trial to conform the pleadings to the facts proved, or to amend the answer. It is now too late to do either. The power of the general term to amend a pleading, or to conform the pleadings to the proof, is only exercised to support or sustain the judgment—never to reverse it." In *Steinam v. Strauss*, 18 N. Y. Supp. 48, it is said: "Two questions are raised upon this appeal. The first is whether the judgment was void upon its face; and the second, whether, as matter of fact, and from proof of extraneous circumstances, it was invalid. The latter proposition it is not necessary to consider. No such issue was presented by the complaint, and although evidence was taken in respect thereto, and the learned judge seems to have passed upon the same, yet, as it was not within the scope of the pleadings, and they never having been amended for the purpose of conforming the pleadings to the proof, this question was improperly considered by the court, and the result of the decision it is not necessary to review here. If it may be said that the court should amend the pleadings to conform the same to the proof, the proof having been taken without objection, it may be suggested,

in the first place, that objections appear as to some of the proof, and also that a complaint is never amended for the purpose of reversing a judgment, although such amendments are made in some instances for the purpose of sustaining a judgment." In *Weems v. Shaughnessy*, 70 Hun (N. Y.) 175, the last paragraph of the syllabus reads: "Pleadings will not be conformed to the proof for the purpose of reversing a judgment." In the opinion, on page 177, it is said: "But, although pleadings are sometimes made to conform to the proof in order to support a judgment, we have not yet heard of a case where such a practice was resorted to for the purpose of reversing a judgment." The court of appeals has also spoken on the subject. In *Volkening v. De Graaf*, 81 N. Y. 268, the last paragraph of the syllabus reads: "The pleadings in an action will not be amended on appeal to this court for the purpose of reversing a judgment." In the opinion by Mr. Chief Justice Folger, on page 272, it is said: "It is urged that as the averments of the answer show the true contract between the parties, as shown by the proofs, the complaint may now on appeal be amended so as to conform to the proofs, and judgment be given thereon for the plaintiff; and *Bate v. Graham*, 11 N. Y. 237, *Pratt v. Hudson R. R. Co.*, 21 N. Y. 305, and *Haddow v. Lundy*, 59 N. Y. 320, are cited. Those were cases of a recovery by the plaintiffs below and an appeal by defendant to this court. We may not amend the pleadings on appeal so that we may reverse a judgment."

The supreme court of Vermont has had the same question under consideration, and in *Chaffee v. Rutland R. Co.*, 71 Vt. 384, it is said: "An amendment is not allowed if it introduces a new cause of action. An amendment in the case before us is only permitted in order that the pleadings may conform to the proof, and for the purpose of sustaining the judgment, not reversing it (1 Ency. Pl. & Pr. 582); for, as said by Redfield, C. J., in *White River Bank v. Downer*, 29 Vt. 332, 'an amendment will cure error, but cannot create it.'"

Peterson v. Lincoln County.

Upon this branch of the case counsel for defendant cite *Humphries v. Spafford*, 14 Neb. 488; *Homan v. Steele*, 18 Neb. 652, and *Bennett v. Baum*, 90 Neb. 320. In *Humphries v. Spafford*, *supra*, the suit was for the foreclosure of a mortgage. In the petition plaintiff appears to have made a mistake in stating the amount due upon the notes, and this court held: "If the amount actually due on the two notes be, as we infer from the brief of counsel, greater than is alleged, if she desire it, the plaintiff may take leave to amend her petition so as to correct the mistake, upon the terms of paying all accrued costs, and have the case remanded to the district court to make the amendment, and for further proceedings. We have no doubt whatever that an amendment at this stage of the case is in harmony with section 144 of the code, where the ends of justice seem to demand it. But, if no amendment be desired, for the reasons stated the judgment will have to be affirmed." The ruling there, if justifiable at all, is under the clause of section 144, "or by correcting a mistake in the name of a party, or a mistake in any other respect." The case has no reference to the clause of section 144 under which relief is sought here. In *Homan v. Steele*, *supra*, the plaintiff recovered, and, in considering the case, MAXWELL, J., said: "It is claimed that the action should have been to recover on a *quantum meruit*, and not upon the contract. * * * The few days which elapsed after the time fixed for the completion and occupation of the building and the time in which it was actually completed and occupied do not in our view affect the right to recover. The defendant's attorneys in their brief virtually admit this, but say the action should not have been upon the contract. This objection should have been made on the trial to be available here. Where proof has been introduced without objection which would entitle a plaintiff to recover, this court would, if necessary, permit an amendment of the petition to conform to the proof, or remand the cause to the district court for that purpose." In other words, if in that case it had been necessary in

order to sustain plaintiff's judgment (not to reverse it), the court would have permitted an amendment of the petition to conform to the proof, or would have remanded the cause to the district court "for that purpose," but not for a new trial. In *Bennett v. Baum, supra*, counsel rely upon the tenth paragraph of the syllabus, which reads: "Where it is clear that all of the evidence to sustain or defeat an issue was adduced by the respective litigants in an equitable action in the district court, it is competent on an appeal for this court in the interests of justice to permit amended pleadings to be filed so as to conform to that proof." Even under this syllabus defendant would not be entitled to the amendment tendered, for the reason that it is not clear in this case that all the evidence to sustain or defeat an issue was adduced "by the respective litigants." On the contrary, it is urged by plaintiff here that, if the proposed amendment had been made in the court below, they could have met and overcome it. Whether this be true or not, the fact is they did not have the opportunity to meet it upon the trial below, nor did the trial court have any opportunity to pass upon it. But let us see why the amendment was permitted in *Bennett v. Baum*. In the opinion on page 337, ROOT, J., said: "But, however liberal we may desire to be in affirming a judgment, we cannot sustain a finding which is not responsive to any allegation in the pleadings, nor to a theory mutually adopted by the litigants in the district court. We have the authority to permit amendments in this court. We therefore shall permit the plaintiffs, if they are so advised by counsel, to amend their petition so as to allege such facts *as will justify us in sustaining the decree* quieting title in the Bennett Company to all of the real estate described in the referee's report, and to a decree for a specific performance of their contract for one-fifth of the \$200,000 capital stock of the Bennett Company. Ordinarily such amendments would not be permitted. In the instant case counsel for the defendants strenuously objected to the introduction of all evidence touching title

to this real estate. We are confident, however, that the defendants will not be prejudiced by the amendments, because all features of the transactions touching those subjects have been testified to by the only persons having knowledge thereof, and this litigation should cease at as early a day as possible." It will be seen that there is nothing in any one of the three cases cited which conflicts with the holdings of the New York and Vermont courts, herein adopted by us. The amendment tendered is not for the purpose of sustaining a judgment, but for the purpose of reversing it; not to cure error, but to create it. In the opinion of the writer, in which he is not alone, such a request should never be allowed in this court; but a majority of the court are of the opinion that we should not go further than to hold that: "The power of the supreme court to permit an amendment of a pleading to conform to the proofs is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice." As this case does not present such a situation, the request of defendant to file the amended pleading tendered is denied.

The only question left is: Is the decree of the district court sustained by the pleadings and proofs upon which it was based? After a careful reading of the entire record, we feel that that question must be answered in the affirmative.

The judgment of the district court is therefore

AFFIRMED.

ROSE, J., took no part.

LEETON, J., dissenting in part.

I do not agree with the proposition that the proposed amendment changes the "claim." The action is based on fraud. The tendered amendment merely adds another specification of fact tending to establish the same. Otherwise, I concur.

SEDGWICK, J., dissenting.

The majority opinion announces two new propositions of law, neither of which have been so determined heretofore by this court.

1. The first proposition is that, in an action for fraud where facts constituting the alleged fraud are stated, an amendment which alleges additional facts constituting the same fraudulent transaction changes substantially the claim or defense, so that such an amendment cannot be allowed in any case after judgment. Section 144 of the code contains the language: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading * * * when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." What does the statute mean by the words "change substantially the claim"? In one sense of these words, any change of a petition which would admit of a different decision than could be supported by the original petition would of course be a substantial change, but unless such a change can be made—that is, unless a pleading can be amended so as to support a different judgment—there would never be any object in making the amendment. The purpose of allowing the amendment is to support a judgment that otherwise would not be supported, and this of course, in the ordinary sense of the word, is a very substantial change. We have, however, generally held that to change "the claim" is to substitute a new cause of action for the former one or to add a new cause of action to the former one, and I suppose that the purpose of this proviso in the statute is to prevent an amendment that would allege a new cause of action, and not to prevent any change or amendment that would add to or make more certain the cause of action upon which the suit was based. And then, again, to change substantially the claim is not limited to changing the claim alleged in the original pleading, but under the liberal practice of our code must be

held to mean the claim actually tried in the lower court, whether it was in the pleadings or not. I think that the opinion gives the wrong construction to the language of the statute in that regard.

2. I am still more strongly opposed to the new construction which is given to the statute in another respect. The second paragraph of the syllabus is: "The power of the supreme court to permit an amendment of a pleading to conform to the proof is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice." There are many decisions of this court in which it is held that a pleading may be amended after judgment to conform to the proofs, and in all of them the language is general and no distinction made as to whether such amendment will sustain or reverse the judgment of the trial court. The first case cited and reviewed in the majority opinion is *Humphries v. Spafford*, 14 Neb. 488. The opinion was by Chief Justice LAKE. The petition in foreclosure failed to allege that no payments had been made on the note, the allegation being that no payments were made at the particular time when the notes fell due. The petition also failed to allege that the defendant failed to pay interest "within ten days after due." The allegation was that he failed to pay it on the particular day on which it came due. The trial court therefore held that one of the notes was not due and refused to give the plaintiff judgment thereon. The plaintiff appealed, and the supreme court held that upon appeal her petition might be amended in accordance with the evidence upon the trial, and that the case would be remanded to the trial court for that purpose, if she decided to so amend. This was a direct holding that the pleadings would be amended for the purpose of reversing the judgment of the trial court. In regard to this case the opinion says: "The ruling there, if justifiable at all, is under the clause of section 144, 'or by correcting a mistake in the name of a party, or a mistake in any other

respect.'” But section 144 of the code provides that a pleading may be amended “by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case.” Inserting other allegations material to the case is precisely upon the same basis in the section as correcting a mistake in the name of the party, or a mistake in any other respect, and the fact that the pleading may be amended by inserting other allegations “material to the case” shows clearly that the next clause, that amendments may be made when they do not “change substantially the claim,” means that they may be made unless a new cause of action or defense is stated that has not been tried below. The opinion cites early cases, mostly from inferior courts, that hold that amendments will never be allowed for the purpose of reversing a case, but I think that those cases are hostile to the language of the statute, which does not limit the allowing of amendments to supporting the judgment, but requires them to be made when it is “in furtherance of justice” to have them made. In *Humphries v. Spafford*, *supra*, the leading case above referred to, it was in the interest of justice to the plaintiff to allow her to amend her petition to conform to the proofs which were made upon the trial, and reverse the judgment of the district court refusing to allow her to recover upon both of her notes, and I think the decision was right. It has never been criticised by this court, but has been apparently universally followed and ought to be adhered to. Suppose that in an action to foreclose a mortgage the plaintiff failed to make the technical allegation that there had been no proceedings at law to recover the debt, both the plaintiff and the defendant, as well as the court, supposed that that allegation was in the petition and tried the case fully upon that theory, the proof showing plainly that there had been no proceedings at law, but the trial court for some unaccountable reason refused to enter judgment for the plaintiff and the plaintiff appeals to this court, and for the first time it is ascertained that the

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allegation that no proceeding at law had been had was omitted from the petition, would this court refuse to allow such amendment and refuse to allow the plaintiff to recover, that being the only possible legal objection to such recovery?

Unless the case has been tried in the lower court as though the proposed amendment was already in the pleadings, the amendment is never allowed in this court either to sustain or to reverse the judgment. If it was so tried, and no objection was made to the evidence because of the defect in the pleading and the court or jury determined the issue as tried, the amendment will be allowed in this court, if necessary, to make the pleadings conform to the case actually tried, or the case will be disposed of as though the amendment had been made. Lawsuits were not invented to afford sparring matches to exhibit the cuteness of attorneys at the expense of justice to litigants, at least they are not so regarded in modern times in this state. The courts are not looking for immaterial technicalities to defeat justice.

The second paragraph of the syllabus, which is also quoted in the opinion as the view of the majority of the court, does not harmonize with the discussion in the opinion, and I think that discussion is misleading in view of the quotations made from the early cases in other jurisdictions, which quotations do not fully present the real point decided by those courts. The second paragraph of the syllabus makes an unnecessary and incorrect distinction in amendments in this court. The true test is, are they in furtherance of justice? And that depends upon how the case was tried in the court below. If the parties, without any suggestion of defect in the pleadings, have fully and fairly tried the cause, the pleadings in this court should be made to state the cause actually so tried, or the cause should be disposed of here as though that had been done.

HAMER, J., concurs in this dissent.

ISAAC WARD, APPELLEE, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 18, 1912. 'No. 17,065.

1. Negligence: "ACT OF GOD." "A snow storm of such violence as to prevent the moving of trains is an act of God." *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197.
2. ———: EVIDENCE. In an action for damages on account of negligence, the negligence must be established by direct proof, or by showing facts and circumstances from which negligence may reasonably be inferred.
3. Evidence examined and referred to in the opinion *held* clearly insufficient to sustain the verdict and judgment.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed.*

Mapes & Hazen and B. H. Dunham, for appellant.

R. J. Millard, *contra*.

FAWCETT, J.

Plaintiff brought suit in the district court for Cedar county to recover for the death of two hogs and the crippling of two others, through the negligence of defendant, while the same were being shipped over defendant's line. From a judgment in his favor defendant appeals.

The evidence shows: That the hogs were shipped from Coleridge, Nebraska, to Sioux City, Iowa; that the line of defendant's road from Coleridge to Wakefield is what might be termed a stub line. Plaintiff's shipment consisted of 71 head of hogs. They were loaded at and left Coleridge between 1 and 2 o'clock in the morning of February 9, 1909, on train No. 44. Freight for Sioux City arriving at Wakefield on No. 44 is transferred at that point to the main line and carried to Sioux City either on No. 56 or No. 14. When the train, of which plaintiff's

car formed a part, reached Wakefield, a snow storm of great severity was blowing and the weather was extremely cold. No. 14 was at that time stalled at Norfolk, some distance west of Wakefield, and No. 56 was stalled on the passing track east of the depot.

The conductor of No. 44 testified: That he had been in defendant's employ for 20 years; that he remembered the storm of February 9; that during the trip they had a little delay at Laurel on account of the high storm; that the storm was fierce at Laurel and he lost one of his men; that when he reached Wakefield the storm was as bad as he had "ever lived in;" that there was a high wind with falling snow and it was bitter cold; that when they reached Wakefield they got as far as the tank and "could not get on the line because the train stalled. The Bloomfield train, bound for Sioux City, was stalled on the passing track east of the depot at Wakefield; they could not get through the drifts on the track, about 200 yards from us. I didn't know they were stalled there until we worked our way to the station and found them. They went as far as they could to the side track while we got tied there. Their engine died next morning about the time ours did. I could have gone 20 or 30 yards farther. There was a drift at the main switch. The only reasonable thing to do was to stop at the water tank, with hopes of doing something after the storm was over. I kept my engine alive until 8 or 9 o'clock the next morning, when she died on us. We had to kill her to keep her from freezing up. It stormed all day Tuesday and Tuesday night, and abated some time Wednesday. When the storm abated everything was blocked wherever snow could lie; side tracks were full of snow; yard was full of snow, deep drifts, perhaps some ten feet right in front of the station; stockyards were level full of snow; snow in box cars and everything; had a regular mountain of ice around our engine. * * * This car of stock got out of Wakefield some time Thursday evening, and went out on the first train. We did everything that we could do to pro-

tect the stock. The storm was so fierce one could not see his hands before his face. It was absolutely impossible to get the cars off on Tuesday morning. * * * Q. Was it possible any time after you reached the water tank on Tuesday morning of your arrival at Wakefield until the track was opened up Thursday afternoon for you to reach the chutes at the stockyards? A. No, sir. Utterly impossible. Q. And why? A. Because of the drifts, deep drifts between there and the stockyards."

Mr. Severance, another witness for the defendant, testified: That he was a freight conductor on defendant railway; that he was at Wakefield on the morning of February 9; was conductor of No. 56; that "it was blowing very hard, a blizzard, you couldn't see anything with distinctness six feet in front of you. The storm first struck us at Wayne, where we had trouble, and it continued getting worse. When we arrived at Wakefield the tracks were covered with snow so it was almost impossible to move without going ahead and shoveling the snow off the tracks so that the sand would take a hold and keep the wheels from slipping. When we struck the yards at Wakefield we first stopped at the water tank. Then we pulled up to the main line, and headed in on the passing track. It took considerable time to get in there on account of the snow. We took the passing track to wait for 14, but 14 did not arrive. It is the train from Norfolk; 44 then came in and stopped at the water tank. We did not go out on account of the blizzard. We tried to get out, made several attempts, made one attempt to get Mr. Hoider's engine (the engine on No. 44) up there coupled onto ours, in order to proceed double headed, but we couldn't do anything. After it cleared up we started to buck snow to clear the road toward Sioux City, and went as far as Emerson, I think we got there between 4 and 5 o'clock on Thursday. We then returned to Wakefield, picked up the stock, including the cars mentioned, and went on to Sioux City. That was the first train that went through from the time the storm began. * * * Q. Was there any time Mr.

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Hoider (conductor of No. 44) could have transferred his car of stock from his train to your train that morning? A. No, sir. Q. Was no time he could do that until after they got the road bucked, as you spoke of? A. No, sir." The testimony of these two witnesses is fully corroborated by defendant's station agent at Wakefield.

As against this testimony on behalf of the defendant, plaintiff testified: "Q. Do you know whether or not the company could have moved your hogs on from Wakefield without this delay you speak of? A. Yes, sir. Q. Could they? A. They could when we got to Wakefield. Could went right along with us; was no storm to bother us, no drifts, because I was out all through there." On cross-examination he shows that he knew the train he shipped on would not go beyond Wakefield; that it goes there and turns around and returns, and is not scheduled to run to Sioux City. He also testified: "I went to Sioux City on the first train that came through after the storm. This was about 10 o'clock Thursday evening. No freight trains had gone through before that time."

The witness Beig testified: That he shipped a car of hogs from Coleridge at the same time plaintiff shipped; that they left Coleridge about 1 o'clock Tuesday morning, and arrived at Wakefield about 4 in the morning; that it was snowing pretty hard. On cross-examination he testified: "The hogs were shipped in open stock cars. It was snowing, and got colder as it stormed. We stayed up to the hotel all day Tuesday, Wednesday and Thursday." On being recalled, plaintiff testified: That they stopped at Laurel en route to Wakefield about 25 minutes. "It was snowing at that time, but wasn't blowing. When we got to Wakefield, Beig and I got out of the caboose and walked up to the depot, and there wasn't a drift between there and the depot. It was snowing quite hard, but the wind wasn't blowing to amount to anything. I had a conversation with Hoider, in which he said that he was holding train for Norfolk train—that was the one that took the stock on—waiting for that one to double engines, and

this other engineer and our conductors wanted to double engines and take us to Sioux City. I was not down around the chutes that night. The Norfolk train hadn't arrived while we were there." The witness Beig, referred to by plaintiff, testified: "When we arrived at Wakefield we walked down to the depot. It was not drifted." On cross-examination he testified: "When we got out of the caboose it was blowing some and there was snow on the ground. It was snowing pretty hard and the wind was blowing."

The testimony of defendant's witnesses that train No. 14 was stalled at Norfolk, and No. 56 on the passing track east of the depot at Wakefield, is not denied. The severity of the storm is not denied, except by the statements of plaintiff and Beig that when No. 44 reached Wakefield they got out of the caboose and walked to the depot, and that there were no drifts between the train and the depot. We have read the abstract of the testimony carefully, and are unable to find anything in it which even tends to show any negligence on the part of the defendant in failing to get plaintiff's stock through to Sioux City any sooner than was done. In the face of the severity of the weather and the immense quantities of snow, the defendant's agents in charge of the trains at Wakefield were the only ones qualified to determine whether or not it was wise to attempt to move the stock in controversy from Wakefield to Sioux City on that morning. We think it is clear that, if they had attempted to do so, the train would have been unable to reach even the next station, and would in all probability have been stalled out in the country, where it would have been next to impossible to feed and care for the stock; in which event we think, under the evidence in this case, plaintiff would have had reason to complain of their having made such a foolhardy attempt. That "a snow storm of such violence as to prevent the moving of trains is an act of God" was decided by this court in *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197. That the snow storm of February 9, 1909, was such a storm is clear.

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The only testimony as to the death and crippling of the hogs is the following given by plaintiff: "I didn't see anything wrong with the hogs until Wednesday, about 10 or 11 o'clock, I saw two dead. There was two crippled when I got to Sioux City. I think they crippled them transferring. They ran a wagon box from one car to another, and got the cars as close as they could get them together, and drove them across. This was Wednesday night." It is clear from the record before us that plaintiff was accompanying his shipment of hogs, yet he does not attempt to relate any circumstance tending to show what caused the death of the two hogs, nor does he account for the crippled condition of the other two any further than to say, "I think they crippled them transferring." There is no claim that any of the hogs were dead or crippled when they reached Wakefield.

For aught that appears in the record, the two hogs may have died from disease, or may have been trampled to death by the other hogs in the car. One thing is certain, they were not killed by any bumping or rough handling of the car, for it had not been moved from its position near the water tank up to the time plaintiff says he saw them dead. There is an entire absence of evidence to show that their death was the result of any negligence on the part of defendant. In like manner, there is no testimony to show how the other two hogs became crippled, beyond the statement of plaintiff that "I think they crippled them transferring." By this he meant the transferring of the hogs from the car in which they arrived at Wakefield to the one in which they were finally taken to Sioux City, which transfer was made Wednesday night. There is nothing in his testimony, nor in the record, from which it can even be inferred that the method of making the transfer, testified to by him, was not as safe as any that defendant could have used; nor is there any testimony to show that, while making the transfer, the hogs were so handled that the crippling of the two might reasonably be inferred therefrom. There must be some-

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thing more than a mere suspicion to sustain a charge of negligence. In an action for damages on account of negligence, the negligence must be established by direct proof, or by showing facts and circumstances from which negligence may reasonably be inferred.

REVERSED AND REMANDED.

**FLORA M. MARSH ET AL., APPELLEES, v. EDITH V. MARSH
ET AL., APPELLANTS.**

FILED OCTOBER 18, 1912. No. 16,891.

1. **WILLS: CONSTRUCTION.** When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one meaning must be so construed, if reasonably practicable, as to harmonize with the plain provisions of the will.
2. ———: ———: **"LEGAL REPRESENTATIVES."** In wills and other written instruments, the words "legal representatives" are frequently used to mean the persons who succeed beneficially to the property or interest of the deceased. Whether in any given case they are so used, or the executor or administrator is intended, must be determined from a consideration of all of the provisions of the will.
3. ———: ———: **"HEIRS AND LEGAL REPRESENTATIVES."** The use of the expression, "heirs and legal representatives," instead of "heirs, executors and administrators," may, under some circumstances, raise the presumption that those who are beneficially interested and succeed to the property and rights of the decedent are intended.
4. **Husband and Wife: DISPOSITION OF PROPERTY: REMOVAL OF DISABILITIES.** Our statute has taken away the common-law power of a husband to dispose of his wife's property. A married woman has the same power to dispose of her property and property rights that a married man has to dispose of his.
5. ———: **CONTRACTS OF MARRIED WOMEN.** In this state the contract of a married woman must be with reference to her separate estate or property. If she provides in her contract that she intends to bind her separate estate thereby, without describing any

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property or property rights, it binds only the property and estate which she has at the time of making the contract, and the proceeds thereof, or substitute therefor. If she assigns specific property or rights, such contract is "with reference to her separate estate."

6. *Quære*. Whether a remainder limited to the heirs of one living at the time it is granted is assignable, *quære*.
7. **Husband and Wife: DISABILITIES OF COVERTURE: ASSIGNMENT: ESTOPPEL.** The defense of coverture is based upon lack of power. When the power to act is entirely wanting, no estoppel can arise from an attempt to perform such act. But when a contingent interest in property is so remote as to be incapable of sale or assignment, an attempt to assign it upon adequate consideration and subsequent conduct continued until after the title of the assignor has become perfect, there being no lack of power, may create an estoppel to deny the validity of the assignment.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed with directions.*

Francis A. Brogan, for appellants.

T. J. Mahoney, H. C. Brome and William J. Coad,
contra.

SEDGWICK, J.

William W. Marsh of Omaha died April 2, 1901, leaving an estate of about \$625,000. He left a widow, Flora M. Marsh, and four sons, Charles, Frank, William, and Allan A. Marsh. Charles Marsh died in 1909. The defendant Edith V. Marsh is his widow, and the defendant Gertrude J. Marsh is their minor daughter. About a year before his death William W. Marsh executed a will, in which he appointed his widow and his four sons trustees of his estate, with large powers and discretion in the control and management thereof. The will was duly probated, and the trustees named assumed the trust and took control of and administered the estate. The plaintiffs Flora M. Marsh, Frank Marsh, William Marsh, and Allan

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A. Marsh, as trustees under the will, brought this action in the district court for Douglas county to obtain a construction of the will. Charles Marsh, at the time of his death, was indebted to the defendant the United States National Bank of Omaha upon several promissory notes, and the bank answered in the action, and alleged that to secure this indebtedness Charles Marsh had assigned to the bank his interest in the estate of his father, and that the defendant Edith V. Marsh had joined in the assignment, and the bank asked that the administratrix of the estate of Charles Marsh be required to pay the claim of the bank out of the estate of Charles Marsh. Edith V. Marsh contested the right of the bank under the assignment, and contended that, as Charles died before January 1, 1910, he had no interest to assign, and that her assignment was void because of her coverture, and because her interest was contingent and not assignable.

The will contained the following provisions:

"Third. All the residue and remainder of my estate, both real and personal, of every kind and nature whatsoever, and not heretofore given and bequeathed to my beloved wife Flora M. Marsh, I hereby give and bequeath in trust in manner and for the purposes, to wit: To my wife Flora M. Marsh, Charles Marsh, Frank Marsh, William Marsh and Allan A. Marsh, my sons, I give and bequeath all of said residue and remainder of my estate, both real and personal, in trust, to be held and managed by them as trustees, until the first day of January, A. D. nineteen hundred and ten (1910), hereby authorizing and empowering them to invest, re-invest and keep said property so that it will produce an annual income, using their best judgment and care in the management thereof, and in the discharge of said trust, I hereby authorize and empower my said trustees, while they shall have and hold said residue and remainder or any part thereof in trust as aforesaid, to sell, convey and dispose of the same or any part thereof at public or private sale, at such times and upon such terms and conditions, and in such a manner as

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to them shall seem best and proper, and to re-invest the proceeds of such sale or sales in other property or securities to be held by them upon the terms and conditions of said trust, hereby authorizing and empowering my said trustees to make any, all and any deeds, conveyances and transfers, and execute the same, judged by them necessary and proper to carry out the purposes of this trust or their duties as such trustees. And I further direct and authorize that it shall not be essential for said trustees to act unanimously, but a majority of said trustees are authorized and empowered to do any and all acts and to execute any and all powers required to be done in said trust, and in the event that either or any of said trustees shall resign, die, or for any cause fail to accept this trusteeship, then in such case the majority of such of said trustees as are then acting as trustees at the time any act or thing is done or performed, may do or perform said act or thing as fully and legally as all of said trustees could or might do or perform the same unanimously."

"Sixth. After paying all expenses and all taxes and other charges including the payments to be made to my sister Stella M. Champlin, and my beloved wife Flora M. Marsh, I will and direct that the balance of the rents, profits and income annually derived from said property so held in trust, shall be divided equally between my said wife Flora M. Marsh, Charles Marsh, Frank Marsh, William Marsh and Allan A. Marsh, and in the event of the death of either of my said sons, his part shall go to his heirs or legal representatives as provided by the laws of the state, and said balance of said income so to be divided and paid to my said wife and sons under this sixth division of my will shall be paid quarterly."

"Eighth. I will and direct that on the first day of January, A. D. 1910, all of said property held in trust, as aforesaid, shall vest in and be disposed of as follows, to wit: To my sister, Stella M. Champlin, if she shall then be living I give the use of and income of ten thousand dollars during her natural life, the said income to be

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paid to her annually, and for the purpose of carrying out this gift and provision to my said sister, I direct that my said trustees shall invest the sum of ten thousand dollars (\$10,000) in some suitable investment the income thereof to be paid annually to her as above directed, and the payments to her of the annual sum of six hundred dollars hereinbefore directed shall cease and be at an end on January 1st, 1910.

"Ninth. I will and direct that all of my estate both real and personal and so held in trust, by my said trustees, shall vest in and go, on the said first day of January, nineteen hundred and ten (1910), subject to the provisions for my sister Stella, in the eighth division of this my last will and testament as follows, to wit: To my beloved wife Flora M. Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in her own right; to my beloved son Charles Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right; to my beloved son Frank Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right; to my beloved son William Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right; and to my beloved son Allan A. Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right. Should my beloved wife Flora M. Marsh not be living at the time of my death I will and direct that the property given and bequeathed to her in second division of this will shall go to my said trustees to be held in trust upon the terms and conditions of the other property held in trust and shall go at the expiration of said trust to wit, January 1st, 1910, as the other property goes, except such as may be worn out or consumed in the use or become worthless by age, and loss, to my said sons. And I further will and direct that if either or any of my sons shall not be living at my death to take under this will, then I give and be-

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queath that part of the income going to him or them, to his or their heirs and legal representatives to go as provided by law. And at the death of my sister Stella on or after the first day of January, A. D. 1910, the said ten thousand dollars shall go as follows: I will and direct that said ten thousand dollars shall be equally divided between my wife and sons in the same manner and under the same conditions as the said residue and remainder on the said January 1st, A. D. 1910.

"Tenth. I will and direct that the title and ownership to said property devised in this last will and testament in trust shall not vest in my said wife and sons or either of them, except as trustees, until the 1st day of January, A. D. 1910. And in the event that my said wife or either or any of my said sons shall die prior to the 1st day of January, A. D. 1910, then in such case the property or that part thereof that would have gone to her, him or them shall go to her, his or their heirs and legal representatives according to law as the case may be."

"Twelfth. I will and direct that at the expiration of this trust, January 1st, A. D. 1910, said trustees shall turn over to the parties then entitled thereto the property which such persons are entitled to, and in the discharge of the duties under this trust I direct that no bond be required of either or any of said trustees, as I rely upon the sound discretion and good faith of each and all in the performance of their duties herein."

It is said in the briefs that three principal questions are presented: First, would the bequest to Charles Marsh vest in him an estate in his lifetime and subject to his debts, or was his interest under the will contingent upon his living until the 1st day of January, 1910? Second, if the estate was contingent and, he having died before that time, was not subject to his debts, who took the estate under the terms of the will, his wife and child as his heirs, or the administrator of the estate as his legal representative? Third, if his widow and child took the estate as his heirs, did the interest of the widow, Edith V.

Marsh, go to the bank under the assignment which she executed?

The trial court held, under the first proposition, that the estate of Charles Marsh was a contingent one, and, under the second proposition, that under the terms of the will it went to the administrator of the estate of Charles Marsh, and directed that it be applied by the administrator to the payment of his debts. From this decree the defendants Edith V. Marsh and Gertrude J. Marsh have appealed.

It must be conceded that the questions thus presented to this court are not free from difficulty. There is a variety of expressions in the will apparently bearing upon the matters in dispute, and, if taken literally as such words are ordinarily used, they appear in some instances to be inconsistent.

1. We are inclined to agree with the trial court upon the first proposition determined. The object is to ascertain, if possible, the purpose and meaning of the testator. When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be so construed, if reasonably practicable, as to harmonize with the plain provisions of the will. The statement in the eighth paragraph of the will, "that on the first day of January, A. D. 1910, all of said property held in trust, as aforesaid, *shall vest in and be disposed of* as follows, to wit:" and in the next paragraph the words, "shall vest in and go, on the said first day of January nineteen hundred and ten (1910) * * * as follows. to wit: * * * to my beloved son Charles Marsh, I give and bequeath an undivided one-fifth part of said property, absolutely and in his own right," and also in the tenth paragraph, "I will and direct that the title and ownership to said property devised in this last will and testament in trust shall not vest in my said wife and sons or either of them, except as trustees, until the 1st day of January, A. D. 1910," appear to be positive and unequivocal, and no doubtful or ambiguous expressions should be allowed to

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override them. The language quoted above from the tenth paragraph of the will appears to have been used for the express purpose of determining this question. The title to the property, it is of course conceded, is vested in the trustees named in the will; and to leave no question of his intention the testator says that not only this title but the ownership of the property shall not vest in his wife and sons or either of them, except as trustees, until the time fixed in the will for that purpose.

2. The next question presented is a more difficult one. Charles having died before the property vested in him, who took the property under the terms of the will? In the able and exhaustive argument presented upon both sides of this question, it is made to turn largely upon the construction of the words "legal representatives" in the tenth paragraph of the will: "In such case the property or that part thereof that would have gone to her, him or them shall go to her, his or their heirs and legal representatives according to law as the case may be." In statutes, contracts and wills, the words "legal representatives" are undoubtedly more often than otherwise used to designate the executors of the will or the administrators of the estate. These words are, however, frequently used to designate the party or parties who succeed to the property or interests of the deceased, who stand in his place, and so represent his rights. In what sense these words were used in this will must be determined from a consideration of all of the provisions of the will. The income of the property, by the sixth paragraph of the will, was to be distributed as it accrued to the beneficiaries named, and it was provided that, "in the event of the death of either of my said sons, his part shall go to his heirs or legal representatives as provided by the laws of the state." The use of the conjunction "or" in this provision and the conjunction "and" in the corresponding provision in paragraph 10 was apparently inadvertent, and has no significance.

In the first place, if the testator had intended that, in

the event of the death of one of the beneficiaries before the property vested in him, it should go to his executor or his administrator, it would have been easy, and perhaps natural, to have used those words instead of the words "legal representatives." The testator appears to have had confidence in his sons; they are made trustees, and the power and discretion given them in the use and control of the property is but very little restricted. They were not required to give bond, and, if some of them became disqualified or declined to act, no others were to be selected in their places. Under the provision of this will, Charles might have become sole trustee without bond. The object of placing this property in trust is stated in the will, and is for business purposes to keep the estate intact and enhance the value; but the sole purpose of the tenth paragraph of the will is to prevent the estate from vesting in the beneficiaries until the specified time, and to provide for the contingency of the death of one or more of the beneficiaries before that time. We cannot discover any purpose that could have been in the mind of the testator in inserting this tenth clause in his will that would not be effectually thwarted by providing that, in case of the death of one of the beneficiaries before the time specified, his share should go to the executor or administrator of his estate. In construing this tenth paragraph of the will, we are required, if possible, to give some meaning to the words "according to law as the case may be." The right of succession to the property of decedents is regulated by statute. These statutes determine the person to whom the property shall descend. Changes in that regard are not infrequent; indeed, radical changes have been introduced into our law since the execution of this will and the death of the decedent, in regard to the persons entitled to inherit and the manner of descent of property. If the testator intended that, in the event of the death of his son within the time stated, his portion of the property should go to the persons to whom the law, as it existed at the termination of the trusteeship, would give it, under the cir-

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circumstances and conditions that should then exist, the words "according to law as the case may be" might have been used for that purpose. No other use for these words has been suggested.

Some of the conditions and surrounding circumstances at the time of the execution of the will might indicate a different intention on the part of the testator. As an illustration of this last thought, it may be noted that Charles was indebted to his father in a considerable amount at the time of the making of the will and continuously until his father's death. Did the testator intend that, in case of Charles' death before the 1st day of January, 1910, his portion of the property should go to his widow and children, and his indebtedness to his father's estate should remain unpaid? If the relations between Charles and his father had been those of ordinary debtor and creditor, this suggestion would have weight. Mr. Marsh, after the execution of the will, advanced money to Charles with which to meet his existing liabilities, and perhaps for speculative purposes, and, although he took Charles' note for the amount so advanced, it is not clear whether he expected to enforce collection of the note, or regarded it as substantially a gift to his son. At all events, the circumstance that he made no provision for the collection of the note in the remote contingency of the death of his son before he came into his inheritance is not of sufficient weight to determine the question presented. The briefs contain exhaustive and admirable arguments upon both sides of this question, and, if time would permit, it would be interesting to pursue the discussion further, but in the end the solution of the riddle would still be in doubt, and no good purpose served by prolonging this opinion. If our construction of the will is somewhat technical, it must be conceded that there is no substantial basis for a broader construction.

We have concluded that the necessary construction of the will as a whole, under all of the circumstances, is that it gave the share which Charles would have taken, if he

had lived to the time specified, to the persons to whom, at that time, it would descend under the law as it should then be.

3. Charles Marsh assigned his interest in certain securities belonging to the estate to secure an indebtedness now held by the defendant bank. His wife, Edith V. Marsh, joined in the execution of the assignment, which contained the following provision: "I, Edith V. Marsh, do hereby consent to join in the above assignment, it being understood that said assignment is of all interest, present and prospective, actual or contingent, of either said Charles Marsh or myself in or to said bonds." Also to secure the same indebtedness, they executed another assignment covering both the income that was coming to Charles Marsh and his interest in the principal of the property in the hands of the trustees. This assignment provided: "The intention hereby being to assign so much of the income and principal due, or to become due to either of the undersigned in the assets of said estate, whether present or future, actual or contingent, to fully pay and satisfy the interest and principal of the aforesaid notes." It is contended that these assignments were ineffectual to transfer the interest of the defendant Edith V. Marsh in the estate. The first contention in this regard is that, Edith V. Marsh being then a married woman, she was incompetent to convey such interest. The first and second sections of our married women's act (Comp. St. 1911, ch. 53) are as follows:

"Section 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts"—with a proviso as to family necessities.

"Section 2. A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property."

Formerly at the common law the personal property of a married woman was subject to sale and disposal by her husband. The first section of the act above quoted took this power over the personal property of the wife away from the husband. The language of the section is broad enough to cover any interest whatever that the wife might have in any property. As the power to dispose of property must exist, it is manifest that the intention of the legislature in these two sections was to transfer the power of disposal of the wife's property from the husband to the wife, and we have no doubt that under our statutes a married woman may dispose of her property "to the same extent and with like effect" as a married man may dispose of his. *Levi v. Earl*, 30 Ohio St. 147; *Ankeney v. Hannon*, 147 U. S. 118, and similar cases were decided under statutes very different from ours. Some of the language used in those cases, and apparently relied upon here, is not applicable.

The question frequently arises whether the contract of a married woman has reference to her separate estate. If she provides in the contract that she intends to bind her separate estate, without describing it, it is usually construed to mean her separate estate at the time of entering into the contract, and property afterwards coming to her by gift or will, and not from her husband, is not affected by such contract. This was so held in *Lee v. Cohick*, 39 Mo. App. 672. The question was whether the contract of a married woman for legal services, with an agreement in general terms that the contract should bind her separate estate, but without describing or naming any property right or interest, would create an indebtedness that could be collected from after-acquired property. It was

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held that it would not, and that is the meaning of the rule stated in the syllabus: "A married woman can by her contract only charge a separate estate held by her at the date of such contract, or the subsequent substitute therefor." If she executes a promissory note, and it is attempted to enforce it against her property generally, this question becomes important. It has been generally held by this court that, if a married woman has no separate property at the time of entering into a contract, it cannot be said that the contract is with reference to her separate estate; but, if she has an interest in property and contracts that interest to another, no such question arises. If she assigns the property right, the contract must be with reference to that right. In *Tyler v. Winder*, 89 Neb. 409, it was held: "A married woman who has no separate estate may employ an attorney to begin and prosecute or defend an action for divorce, and make a valid contract to compensate the attorney for his service in such action." In the opinion *Kocher v. Cornell*, 59 Neb. 315, and other cases are referred to, in which it is held that, "when a married woman signs a note as surety, and has no separate estate or property at the time of signing, it will be presumed that she did not contract with reference to her property or business." And it is said: "If she has rights to protect or enforce, and makes contracts reasonably appropriate to enforce or protect them, the case is entirely different."

The next contention is as to the character of the interest of Mrs. Marsh of which she attempted to dispose. Is such an interest assignable? Was the subject of this assignment property, or an interest in property that could be assigned? The testator was deceased at the time of the assignment. There was a portion of the estate that would go to the husband or wife if either of them lived until 1910. If the husband lived until that time, his assignment alone would be sufficient to transfer that portion. He had no interest that he could have assigned if he died before that time. The same condition existed in *Taylor*

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v. Taylor, 118 Ia. 407. In that case the will gave the widow of the testator a life estate, and afterwards to his son or his heirs. The court construed this language to mean that, if the son lived to the termination of the particular estate, the property went to him; but, if not, it went to his heirs then living. It was held that the will gave the son a contingent remainder, which could not be levied upon and sold on execution, but which was assignable. Under the authority of this case, and indeed under the authorities generally, there seems to be no doubt of the validity of the assignment of Charles Marsh, so far as any interest which he had in the property was concerned. It was not necessary to consider whether the presumptive heirs of the son of the testator had an assignable interest in the estate. There is in the opinion a quotation from 2 Washburn, Real Property (6th ed.) sec. 1557, p. 527, in which that author says: "But if the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, there is no one who can make an effectual grant or devise of the remainder." If Edith V. Marsh had an assignable interest, it was because she was a presumptive heir of one alive at the time of the grant; and, under this statement of Mr. Washburn, it would seem that she could not make an effectual grant of that interest. The authorities, however, especially the more recent ones, are not united on this proposition. If the rule is supported by the weight of authorities, we think it ought not to be applied in this case. The bank might have enforced the assignment of Charles Marsh, so far as it related to the income which he was receiving from the estate. The indebtedness continued for many years, but the bank renewed it from time to time on the strength of these assignments. The interest in the estate described in these assignments amounted to much more than the claim of the bank, so that if these assignments were valid the claim of the bank was amply secured. By the execution of these assignments the collection of the claim was postponed from time to time, and the husband enjoyed the

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income from the estate which, but for its reliance upon these securities, the bank might have applied upon his indebtedness.

Our statute provides: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Comp. St. 1911, ch. 73, sec. 50. If one sells an article of personal property of which he has no title or possession at the time, but a contingent right, and afterwards acquires the title and possession, he ought not to be allowed to urge his want of title at the time of his contract to enable him to avoid his contract. When Edith V. Marsh executed these assignments it was known by all parties that the right of her husband to assign this interest in the estate might be defeated, as it subsequently was, and she executed these assignments to supply this defect in her husband's right to convey. She knew that if the bank allowed them to enjoy the income from the estate it did so relying upon the validity of these assignments. She ought not now to repudiate them. But her counsel urges that the defense of coverture is the want of power, and that, where there is no power to contract, the attempt to do so will not constitute an estoppel, and it is so held in *Whitlock v. Gosson*, 35 Neb. 829, in which it is said: "Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law." If, however, we are right in the conclusion that married women have the same power to convey their real and personal property that married men have to convey theirs, then the invalidity of these assignments, so far as her interests are concerned, was not for want of power in her to convey; but, if they were invalid at all, it was because of the character of the thing attempted to be assigned. In such case the principle of estoppel applies in full force. We conclude that the interest of Edith V. Marsh in the funds in the hands of the trustees is subject to the claim of the defendant bank.

The judgment of the district court is reversed and the

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cause remanded, with instructions to enter a decree in accordance with the view herein expressed.

REVERSED.

FAWCETT, J., took no part.

LETTON, J., concurring.

The question presented relates to an interest in certain specified personal property. I concur in the view that, under the terms of the will, the title to the bonds assigned never vested in Charles Marsh, but eventually passed by the will to his heirs and legal representatives. I also think the opinion correct as to the meaning of the words "heirs and legal representatives" in this will. The case of *Shackley v. Homer*, 87 Neb. 146, is easily distinguishable. The interest of Mrs. Marsh in the property was contingent upon the death of Charles Marsh before the time when the title would vest in him, and her survival. In equity such contingent interests in chattel property are both devisable and assignable. 1 Fearn, Remainders, 368, 548; *Higden v. Williamson*, 3 Cox's P. W. (Eng.) 131; *Scawen v. Blunt*, 7 Ves. Jr. (Eng.) *294; *Hinkle v. Wanzer*, 17 How. (U. S.) *353. This being the case, the contingent interest of Mrs. Marsh in the bonds passed by her assignment and became effectual by estoppel when the trust estate determined.

PETER FREDERICK, SR., APPELLANT, v. MARY GEHLING,
APPELLEE.

FILED OCTOBER 18, 1912. No. 17,624.

1. **Judicial Sales:** VACATION. Ordinarily judicial sales will not be set aside for inadequacy of the price paid, in the absence of fraud or mistake, when the purchaser pays two-thirds of the appraised value of the defendant's interest in the land.

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2. **Liens: FORECLOSURE: GOOD FAITH.** When two parties have liens on the same land, and the land is of sufficient value to pay all liens, there should be entire good faith between the lienholders to realize sufficient to satisfy both liens.
3. **Subrogation.** The right of subrogation must depend upon the facts and equities of the particular case in which it is asserted.
4. ———: **LIENS.** F. bought land at execution sale upon a judgment owned by him. The certificate of liens showed several mortgages prior to the lien of his judgment. The land sold for more than two-thirds of the appraised value, but much less than its actual value. The prior mortgages had in fact been paid. *Held*, That a mortgagee whose mortgage was on record before the execution sale, and was given to secure a loan with which the prior mortgages were paid, upon an understanding with the mortgagor that it should be a first lien, is entitled to subrogation to the lien of the prior mortgages.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

Isham Reavis and Albert W. Crites, for appellant.

Edwin Falloon and J. H. Edmunds, contra.

SEDGWICK, J.

When this case was here before (89 Neb. 93), it was determined upon a general demurrer to the defendant's answer. The character of the case is stated in the former opinion, and the controlling allegations of the answer demurred to are also stated. The principal defense then insisted upon was that, in the sale upon the judgment under which the plaintiff claims title, the prior mortgages were in fact deducted as liens in the appraisal of the land. It was clearly and positively alleged in the answer "that these liens were deducted from the value of said premises, and said premises were appraised by said appraisers after said liens had been deducted at the sum of \$500." And again: "That at the time said sale was made said liens were still of record and in force on said land and deducted from its appraised value." It was held, as

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against a general demurrer to the answer, that these allegations were sufficient to charge the plaintiff with these prior liens as a part of the purchase price of the land at the sale. The cause has been retried, and is now presented upon the question of the sufficiency of the evidence; the trial court having held that the defendant was entitled to have her mortgage subrogated to the lien of the prior mortgage. The principal question now presented upon this appeal is as to this defense, which was also included in the answer, and upon which the trial court has now found in favor of the defendant.

It appears now from the pleadings and evidence that when the plaintiff purchased the land at sheriff's sale under his judgment he was not personally present at the sale, and had no actual knowledge that the prior mortgage had not been released of record, nor that the defendant's mortgage had been duly recorded. It seems, so far as he is personally concerned, that he purchased the judgment against Buckminster and also the land at the execution sale in good faith. This defendant also acted in good faith in loaning the money for which her mortgage was given and with which the prior incumbrance was paid. The trial court found that the land, at the time of the trial, was worth \$1,600. The plaintiff's judgment at that time, with interest and costs, amounted to less than \$300. The defendant's mortgage was for \$600 and some interest. The value of the land then was amply sufficient to pay both claims. Under such circumstances there should be perfect good faith between the parties. The appraisers at the sheriff's sale appear to have valued the land at \$500, and the plaintiff purchased it at the sale for \$333.35, which was more than two-thirds of its appraised value. It is insisted that under these circumstances the existence of prior liens and the fact that they are shown upon the appraisement are immaterial, and in ordinary cases of judicial sale this is the rule.

It will be remembered that Buckminster was the owner of this land and had given this plaintiff two mortgages

thereon. One of these mortgages included also some land in Richardson county. The plaintiff began an action in the district court for Richardson county to foreclose the last-mentioned mortgage and obtained a judgment of foreclosure therein. Thereupon Buckminster's brother loaned him \$425 with which to pay to the plaintiff the amount of the said judgment in foreclosure, with interest and costs, together with the plaintiff's other mortgage, which covered only the land in question. It is conceded in the briefs that Buckminster's brother, while he held his mortgage on this land, would have been entitled to subrogation to the prior liens held by the plaintiff as against the owner of the land and the plaintiff also. The mortgage, under which the defendant claims, was given by Buckminster to the defendant to secure the money which he borrowed with which to pay this prior mortgage. Some time before either of these two last-named mortgages was given the plaintiff purchased a judgment in justice court of Richardson county against Buckminster, and caused the same to be duly transcribed and docketed in Sheridan county as a lien upon the lands of Buckminster. Plaintiff caused an execution to be issued upon that judgment and levied upon this land. In the meantime, and before the execution sale, the defendant's mortgage was duly recorded in Sheridan county. The appraisers at the execution sale included both the defendant's mortgage and the \$425 mortgage to Buckminster's brother in the statement of liens certified by them to be prior to the lien of the plaintiff's judgment. The plaintiff obtained his title through the acts of the sheriff and appraisers, and is therefore bound by those acts, so far as they affect his title. For the purposes of this action, then, he must be held to have known that the appraisers certified and returned to the court that there were liens upon the land prior to his own, amounting to \$1,182.30. The plaintiff by his purchase took only such title as his judgment debtor, Buckminster, had in the land.

The evidence in many respects is not very clear and

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satisfactory, but it appears from the record that the release of the prior mortgage and the execution of the defendant's mortgage were on the same day, and, in the absence of any other evidence upon that point, it must be presumed that the payment of the prior mortgage and the giving of the defendant's mortgage were at the same time and a part of the same transaction. Under these circumstances was the trial court right in holding the defendant's mortgage prior to the plaintiff's title? It must be conceded that, in view of the very many decisions of this court in regard to the right of subrogation, this question is not free from difficulty. The evidence does not show that there was an express agreement by either the mortgagor or mortgagee in the prior mortgage that this defendant should have that right of subrogation. Her mortgage, however, conveys her "an absolute title in fee simple, including all the rights of homestead, to have and to hold the premises above described, with all the appurtenances thereunto belonging, unto the said Mary Gehling and to her heirs and assigns forever." In *Meeker v. Larsen*, 65 Neb. 158, it is said there must be an agreement or understanding to that effect with one of the parties to the prior lien, or the right of subrogation will not exist. An equivalent expression is used in many other of our decisions; but in other cases it is assumed at least, if not decided, that there must be an express contract, in the absence of any special equities in favor of the subrogation. In *Rice v. Winters*, 45 Neb. 517, the mortgage was given to procure a loan with which to pay off and discharge a prior mortgage, and the mortgagor agreed to secure the loan by a first mortgage, and it was held that the mortgagee in the later mortgage was not entitled to subrogation as against a mechanic's lien intervening between the two mortgages. In a later case, in an opinion by the same commissioner, it was held that a mortgagee whose mortgage was given to secure money with which to pay a prior mortgage, together with taxes and other claims against the land, was entitled to subrogation to

the mortgage and other claims so paid as against the heirs of the mortgagor. *Arlington State Bank v. Paulsen*, 57 Neb. 717, 747. It was said in the opinion: "Only the creditors of the beneficiaries are objecting, but their claims upon the interests of the beneficiaries were subordinate to the debts of the testator against his entire estate; and if the corporations be subrogated, the creditors of the beneficiaries have not been deprived of any right." In the opinion some 15 of our prior decisions are cited as holding this doctrine. In that case the heirs of the mortgagor were resisting the subrogation. In this case it is the purchaser at execution sale of the mortgagor's interest, and the principle would seem to be the same.

The plaintiff cites and relies upon *Bohn Sash & Door Co. v. Case*, 42 Neb. 281, in which it was said: "The mere fact that with the proceeds of a later mortgage prior mortgages have been paid that the lien of them might be removed affords no ground for subrogation thereto." But it is also said in the opinion: "The real question in all such cases is whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him, or whether it was made with the expectation of being substituted in the place of a creditor. If the former is the case, he is not entitled to subrogation; if the latter, he is."

In *Boevink v. Christiaanse*, 69 Neb. 256, the court, in an opinion prepared by Mr. Commissioner HASTINGS, said: "In the recent case of *Cumberland Building & Loan Ass'n v. Sparks*, 49 C. C. A. 510, a loaner who had furnished money to pay off a prior mortgage, under an agreement that it should have a first lien, and had taken an invalid mortgage for its security, was held entitled to subrogation, not only against the mortgagor, but against another lienholder who had notice of the facts"—and that the supreme court of Illinois in *Home Savings Bank v. Bierstadt*, 168 Ill. 618, held that "'conventional subrogation' will always be decreed, where it is in accordance with the understanding of the parties, and there is no gross negli-

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gence, and no injurious result to third parties." It is further said: "Both of these cases are abundantly fortified by other decisions," and that "there is no showing of any injurious change in the devisees' position because of plaintiff's paying the mortgage."

In this case the plaintiff is claiming the land. He is not injured by substituting the new mortgage for the prior mortgage, which was superior to his lien. The language of this court quoted above from the opinion last cited is applicable. The land is of sufficient value to pay both his lien and the defendant's mortgage. There is perhaps a presumption that it would have brought sufficient at the sheriff's sale for that purpose if the prior mortgage had not been certified as an existing lien. There is no doubt, as against the original mortgagor, the defendant's equities are superior. The plaintiff has purchased only the rights of the original mortgagor. Through the mistake of those acting for the plaintiff, the title conveyed by the sheriff's sale was discredited. The plaintiff has brought the matter into a court of equity, and he should do equity by the defendant. In this case the defendant took her mortgage at the same time that the prior mortgage was paid with the money that she loaned; and there is no doubt, under this evidence, that both she herself and the mortgagor expected and understood that she would have the first lien upon the land, instead of the mortgage which was paid with her money.

The plaintiff's petition was framed upon the theory that he took the entire title by his purchase at sheriff's sale, and the prayer was that the defendant's mortgage be canceled. The court decreed that the defendant's mortgage should be canceled upon payment by the plaintiff of the amount secured thereby, and so directly answers the petition and the prayer thereof. Under the facts alleged in the defendant's answer she would be entitled to a foreclosure of her mortgage, and the prayer of her answer was for general equitable relief. There ought not to be any further litigation in regard to this matter. A court

of equity should, if practicable, enter such decree as will dispose of all the matters involved in the litigation. Defendant's mortgage should be allowed as first lien in the amount paid to redeem the land from the prior mortgage, and interest thereon at the rate prescribed in that mortgage to the date of entering the decree. The trial court allowed her the full amount of her mortgage, which was somewhat more than the amount to which she was entitled as a prior lien upon the land.

The trial court found that there was no merit in the claim of the intervener, and the intervener has taken no cross-appeal. It is contended, however, in the brief that the intervener is entitled to a decree on the ground that the land was his homestead at the time the plaintiff's judgment is alleged to have become a lien thereon. The evidence does not show that the land was a homestead, and the decree of the district court in that regard is correct.

The judgment of the district court is reversed and the cause remanded, with directions to enter a decree foreclosing the defendant's mortgage in the amount of the prior mortgage, \$425, and interest, and allowing the plaintiff a reasonable time to redeem therefrom, and quieting the plaintiff's title in the land, subject to the defendant's lien.

REVERSED.

LETTON, J.

I concur in the result only. The maxim, "He who seeks equity must do equity," applies.

MELS GOLDSBERRY V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1912. No. 17,639.

1. Criminal Law: IMPANELING GRAND JURY: OBJECTIONS: REVIEW. Objections to the impaneling of the grand jury may be presented by plea in abatement. If such a plea is made and there is no rul-

ing or refusal to rule thereon by the trial court the objection is waived. The objection cannot be taken by motion in arrest of judgment.

2. **Indictment: REQUISITES: SIGNATURE.** An indictment must be indorsed and the indorsement subscribed by the foreman of the grand jury. Signing of an indictment by the prosecuting attorney is unnecessary and immaterial.
3. **Embezzlement: INDICTMENT: PRINCIPAL.** An indictment under section 121 of the criminal code should show whether the principal whose agent is charged with embezzlement is a private person. If the principal is described as "Lillian Casey," a private person, when first named in the indictment, and afterwards designated as the "said Lillian Casey," the description is sufficient.
4. **Criminal Law: APPOINTMENT OF ASSISTANT PROSECUTOR.** An assistant for the county attorney in felony cases may be selected by him under the direction of the court. Such assistant cannot be selected by private persons interested in the prosecution. A member of the bar of another state may be selected by the county attorney if the court is satisfied that such selection is proper and so directs. Such assistant must be qualified as directed by section 3, ch. 7, Comp. St. 1911.
5. ———: ———: **PRESUMPTIONS.** It will not be presumed that the trial court has neglected its duty in directing the selection of assistant for the prosecuting attorney. Unless the record shows affirmatively that such assistant did not take the oath prescribed by statute, such omission will not be presumed. The recital in defendant's affidavit filed with motion for new trial that the oath was not taken will not be regarded by this court as establishing that fact. Whether an assistant who has been properly procured under the direction of the court will afterwards be disqualified by receiving additional compensation from private persons is not decided.
6. ———: **MISCONDUCT OF PROSECUTOR: OBJECTIONS: REVIEW.** Objection that the prosecuting attorney is guilty of misconduct at the trial prejudicial to defendant must be taken at the time. It is primarily a question for the trial court. It is too late to make the objection for the first time in the motion for a new trial.
7. **Embezzlement: AGENCY: EVIDENCE.** If an agent receives a draft from his principal with instructions to purchase certain property therewith, and the agent pursuant to that employment obtains the money on the draft and afterwards converts the money, the jury will be justified in finding that he obtained and had the money as agent of the person from whom he received the draft.

8. **Criminal Law: INSTRUCTIONS: ADMISSIONS.** It is without prejudice to the defendant if the court instructs the jury in a trial for felony that certain facts stand admitted, when the defendant himself and other witnesses have testified to the facts stated, and there is no evidence to the contrary.
9. ———: ———: **VENUE.** If the court submits the question as to the place of the commission of the alleged crime fully and fairly to the jury, it will not be held prejudicial error to tell the jury that they have nothing to do with the law question involved in determining the proper venue.
10. ———: ———: **OBJECTIONS.** If the defendant desires instruction upon matters not mentioned by the court in its instructions, he should request the same. An objection in this court that important matters were omitted from the instructions, without specifying what those matters were, will not ordinarily be considered.
11. **Embezzlement: EVIDENCE.** The evidence is found to be sufficient to support the conviction.

ERROR to the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Burr, Greene & Greene, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

SEDGWICK, J.

The defendant, who is plaintiff in error here, was convicted in the district court for Lancaster county of the crime of embezzlement. He urges several grounds on which he thinks he is entitled to a reversal of the judgment.

1. The first objection is as to the impaneling of the grand jury which found the indictment. It is said that the jury which was impaneled for the first term of the year 1911 was selected from the old list prepared during the preceding year. It appears that a plea in abatement was filed upon this ground, but the record does not show that any action was taken by the court upon this plea. After

the verdict, a motion was filed in arrest of judgment upon this ground, and it is now insisted that the court erred in overruling this motion. Section 493 of the criminal code provides that a motion in arrest of judgment may be granted by the court when the offense charged is not within the jurisdiction of the court, and when the facts stated in the indictment do not constitute an offense. Section 444 provides that all defects which may be excepted to by a plea in abatement shall be taken to be waived by pleading in bar or the general issue. The question here presented is properly raised by plea in abatement, and, the court not having ruled upon that plea, nor refused to make such ruling, the objection now taken is waived. *Dodge v. People*, 4 Neb. 220; *Leisenberg v. State*, 60 Neb. 628.

2. The next objection is that the indictment is not subscribed by the foreman of the grand jury, but is subscribed by the county attorney. Section 408 of the criminal code provides that, when indictment is found, the "foreman shall indorse on such indictment the words, 'A true bill,' and subscribe his name thereto as foreman." This was done in this case, and was all the signature necessary, and the signature of the county attorney, it appears, neither adds to nor detracts from the force of the indictment.

3. It is contended that the indictment "does not state facts sufficient to constitute an offense under the laws of the state of Nebraska." The indictment is drawn under section 121 of the criminal code. Under that section the agent of any private person or any copartnership or any incorporated company or any joint stock company who shall do certain things shall be guilty of embezzlement. It is contended that the indictment does not allege that this defendant was the agent of any of these. It alleges that "the defendant (naming him), * * * then and there being the agent of one Lillian Casey, a private person, * * * did * * * receive from said Lillian Casey a certain draft." The indictment describes the principal for whom the defendant was acting (as agent) as a private person, and afterwards in every instance refers to her as

the "said Lillian Casey," and we think thereby it sufficiently identifies her as a private person. This objection to the indictment therefore is not well taken.

4. The next objection is that the court erred "in appointing an unsworn, nonresident attorney to aid in the prosecution." The county attorney under the direction of the court procured one Robinson to assist in the prosecution. Mr. Robinson was a resident of Kansas City, Missouri, and appears to be a member of the bar of that state. It is objected that the attorney so selected was not a member of the bar of this state, and had never taken the oath required of an attorney who practices in this state. In *McKay v. State*, 90 Neb. 63, our statute authorizing the county attorney to procure assistance in the trial of felony cases is quoted and construed. The former decisions of this court, both those rendered before the enactment of the present statute and the later decisions, are reviewed, and it is held that the county attorney may procure such assistance under the direction of the court, but that private individuals who are interested in the prosecution are not allowed to select such assistant for the county attorney. Section 3, ch. 7, Comp. St. 1911, provides: "Any practicing attorney in the courts of record of another state or territory, having professional business in either the supreme or district courts, may, on motion, be admitted to practice (for the purpose of said business only) in either of said courts, upon taking the oath aforesaid." No doubt the statute authorizing the county attorney to procure assistance in the trial of criminal cases contemplates that his assistant shall be a duly qualified attorney, and the selection of such an assistant must be under the direction of the trial court who will see that he is duly authorized to appear as an attorney at law. If the attorney so selected is a member of the bar of this state, he will realize the importance of the duties he is to perform under the provisions of our statute, and under his oath as a member of the bar will have continually in mind the duties of that important office as prescribed in section 5

and other provisions of the said chapter. If not a member of the bar of the state, he will qualify himself to practice in the particular case for which he is selected under the provisions of section 3 above quoted.

The abstract in this case shows that counsel for the defendant in the motions and objections made in the trial of the case recited that Mr. Robinson was a nonresident and was unsworn, but these recitals do not establish the fact, and the abstract does not show, that section 3 above quoted was not complied with by the court. The presumption is that the court performed its duty in that regard. It is further insisted that Mr. Robinson had been retained by private individuals to prosecute this case, and that he had been by them paid at least in part for his services. The abstract shows that Mr. Robinson renounced any employment by private individuals, and returned all fees that they had paid him for his services in this case. Whether an attorney who had been procured by the county attorney, under the direction of the court, to assist in the prosecution, for compensation to be paid by the county, would be disqualified by receiving additional compensation from private individuals was not considered or determined in *McKay v. State, supra*, and it is not necessary to determine that question in this case for the reason above stated. It is the duty of the trial court to see that proper selection is made in the interest of the state, and for the promotion of justice in determining the guilt or innocence of the accused, and the presumption is that the trial court has properly exercised its discretion in that regard.

5. It is objected that the evidence is not sufficient to justify the conviction. The indictment charged that the defendant, being the agent of one Lillian Casey, a private person, "did by virtue of such employment as agent * * * receive from said Lillian Casey a certain draft, the property of said Lillian Casey" (setting it out in full); that the draft was indorsed by the said Lillian Casey, and that the defendant afterwards, "in the county

of Lancaster, Nebraska, then and there being, did indorse said draft and receive thereon from the First National Bank, of Lincoln, Nebraska, and take into his possession, the sum of \$800 in good and lawful money of the United States of America, of the value of \$800, the property of the said Lillian Casey, his principal, and did then and there fraudulently, unlawfully and feloniously convert to his own use and embezzle said money without the consent of the said Lillian Casey, his principal." The defendant was a witness in his own behalf, and from his testimony and that of the complaining witness, Lillian Casey, and others, it is shown without contradiction that the draft described was the property of Lillian Casey, and that the defendant received it from her and obtained the money on the draft in Lincoln, as charged in the indictment. The defendant testified that he was asked by Lillian Casey "to cash the draft because she could not be identified and did not care to be known to certain people." It is conceded that he afterwards received and cashed a draft of \$1,000 for Miss Casey, and he testified that he retained \$100 to make himself whole "for the expense of exchange, and money actually advanced" to Miss Casey, and that he paid her \$1,700 at a certain time and place named by him, in the presence of several witnesses. He claims that under these circumstances, if he embezzled anything, it was the draft, and not the money as alleged in the indictment. This evidence does not necessarily establish that he was entrusted with the draft for the purpose of disposing of it without converting it into money. The jury might find from this evidence that his employment by Miss Casey contemplated that he would obtain the money upon the paper which she gave him, and that the money, when so obtained, would be her money and in the defendant's hands as her agent. The suggestion in the brief that he was employed merely as an errand boy is without force. An errand boy is an agent within the meaning of this statute, and is liable as such if he embezzles the money entrusted to his care. Surely an

errand boy sent to the bank with a draft would be guilty of embezzlement under this statute, if, after cashing the draft as directed, he converts the money to his own use with intent to deprive his employer of it. This question was fairly presented to the jury, and upon this point their verdict is undoubtedly justified by the evidence. The evidence as to the payment of the \$1,700 was conflicting, and this question also was properly submitted to the jury.

6. It is contended in the brief that Mr. Robinson, while assisting the county attorney, was guilty of misconduct prejudicing the defendant and requiring a reversal. This question of misconduct of the prosecuting attorney was, so far as the abstract shows, first presented to the trial court in an affidavit of the defendant filed in support of his motion for a new trial. This, of course, was too late to raise such objections as these. If the prosecuting attorney attempted to take any unfair advantage of the defendant in the course of the trial, the matter should at once be called to the attention of the court. The trial court has ample power to protect the defendant in his rights, and the presumption is that, if requested, this would be done. This affidavit, filed upon the motion for a new trial, states that the prosecuting attorney, "when admonished by the court at the request of defendant, emphasized the misconduct and later desisted from it." This statement of itself would prevent the defendant from now urging the conduct of the prosecuting attorney as ground for a new trial. How or to what extent he "emphasized the misconduct" is not stated, and, if he "desisted from it" when admonished, the remedy which the law gives the defendant appears to have been effective. Very much, if not all, of the language of the prosecuting attorney now complained of appears to be such as is generally supposed to be within the line of legitimate argument.

7. Several instructions given by the court are complained of. It is said that instruction No. 2, which states "the material ingredients of the offense," fails to state

"the essential one, that the money was received in a fiduciary capacity." We do not think this instruction merits this criticism. The court told the jury that one of the material allegations was that at the time and place alleged in the indictment the defendant was the agent of one Lillian Casey, and that by virtue of such employment as agent he received from her the draft as alleged in the indictment; that the draft was her property, and that upon indorsing the draft he had received the \$800, as alleged in the indictment, "the same being the property of the said Lillian Casey, his principal." It seems to be contended that if the jury found that he received the draft from her as her agent with instructions to use the proceeds for a certain purpose, but without definite instructions to obtain the money upon the draft, that in obtaining the money he was not acting in a fiduciary capacity. There does not seem to be any merit in this contention, especially in view of the defendant's own testimony above referred to.

In instruction No. 3 the court stated that "it stands admitted" that certain things took place, reciting them, and it is contended that this was error on the part of the court; but we cannot see that the defendant was prejudiced thereby, since he himself testified to the things that the court stated to the jury were admitted, and he was corroborated in this regard by other witnesses, and not disputed by any. Of course, the plea of not guilty put some of these facts in issue, but we cannot see that the instruction was prejudicial in view of the condition of the evidence in the record.

It is complained that the sixth instruction "takes from the jury the facts with reference to venue." In that instruction the court told the jury: "Whether or not this county and state is the proper place for the prosecution of this action is a question of law with which the jury has nothing to do, and you should not consider it." In the third instruction the jury are told: "Whether or not at the time and place alleged in the indictment he converted

the said money to his own use and embezzled the same * * * are questions of fact you have to consider and determine from all the facts and circumstances of the case as shown by the evidence." The fourth instruction given by the court was as follows: "You should consider whether in receiving the money on the draft he received it intending to hold and use it for the purposes for which the money was held by him as her agent as shown by all the evidence, or whether, on the other hand, he took it with the felonious intent of converting the same to his own use and depriving her of the same. You should consider all the evidence as it may bear upon the question how, as between the defendant and Lillian Casey, he held the money, and how he used it, and his intent in the use he made of it."

If the jury found that the defendant converted the money which he received upon the draft to his own use, and formed the intention then and there to deprive the owner of the same, and all this was done at the time and place as alleged, then the action was rightly brought in Lancaster county, and the jury would not be justified in rendering a verdict of not guilty because they thought the law ought not to allow the action to be brought in that county. In the light of these three instructions, this appears to be the idea of the court, and it seems clear that the jury must have so understood it, although the clause quoted above from the sixth instruction is perhaps unusual.

It is urged that the instructions are incomplete; that "something has been left out, * * * the one thing that would entitle the defendant to any relief whatever in the hands of the jury." It is not even stated in the brief what this one thing is. There is no claim that it was stated to the trial court, much less that an instruction was presented and asked that would cure the defect. The abstract shows that the court gave eight several instructions to the jury besides a complete statement of the allegations of the indictment. If it was desired that there should be

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instructions upon other matters, a request to that effect should have been made to the trial court. No instruction was requested except the general one to instruct the jury to find the defendant not guilty.

Not finding any error requiring a reversal, the judgment of the district court is

AFFIRMED.

EMMA C. TYLER, APPELLEE, v. A. L. HOOVER, APPELLANT.

FILED OCTOBER 18, 1912. No. 16,617.

1. **Highways: USE BY AUTOMOBILES.** The law does not denounce the use of an automobile on a public highway, and the appellant is not guilty of negligence because he used one on the streets of the city of Lincoln.
2. ———: ———. It is improper to say that the driver of a horse attached to a carriage has rights in the road superior to the rights of the driver of the automobile, as both have a right to go upon the public highway, and each is restricted in the exercise of his rights by the corresponding rights of the other, and each is entitled to regulate his use of the public streets and roads by the observance towards others on the road of ordinary prudence and care under all the circumstances.
3. ———: ———: **CARE REQUIRED.** The restrictions which the law imposes on all modes of travel on the highways are such as tend to secure to the general public the largest enjoyment thereof, and must be observed and borne by all alike upon the broad ground that all have an equal right to travel in safety; and, when accidents happen as incidents to reasonable use and reasonable care, the law affords no redress.
4. ———: ———: ———. If the driver of an automobile sees that a horse driven to a carriage is restive and frightened, he should take such course to avoid inflicting an injury as the dictates of ordinary prudence may demand. He should reduce the speed of his vehicle, or stop it, if requested to do so, or if he sees that it is necessary to avoid an accident; but he is not relieved from the duty of exercising ordinary care to prevent injury to those he may meet or overtake upon the highway.

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5. ———: ———: ———. The fact that a horse becomes frightened by an automobile upon the highway does not render the operator of such vehicle liable for resulting injury, as the horse has no paramount or exclusive right to the road; and the fact that a horse takes fright at a vehicle run by new and improved methods, and smashes things, does not of itself give the injured party a cause of action.
6. **Appeal: QUESTIONS OF FACT.** The rule is well established that, where there is a conflict of evidence upon the material facts touching the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict of a jury or the findings and judgment of the trial court (*O'Chander v. Dakota County*, 90 Neb. 3); but, where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside (*Garfield v. Hodges & Baldwin*, 90 Neb. 122), as, also, will the findings and judgment of the trial court, where they are clearly against the weight of evidence (*Roberts v. City of Lincoln*, 6 Neb. 352; *Southard v. Behrens*, 52 Neb. 486; *American Fire Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 52 Neb. 676; *Symms Grocery Co. v. Snow Bros.*, 58 Neb. 516; *Frerking v. Thomas*, 64 Neb. 193).

APPEAL from the district court for Lancaster county:
 LINCOLN FROST, JUDGE. *Reversed.*

Hall & Bishop, for appellant.

Charles O. Whedon, contra.

HAMER, J.

This is an appeal by the defendant from the judgment of the district court for Lancaster county. The plaintiff brought an action to recover damages for personal injuries alleged to have been caused by the careless, negligent and unlawful manner in which the appellant, on the 19th day of July, 1908, ran, handled, and managed an automobile, so that, as alleged in the petition, it struck and overturned the carriage in which the plaintiff was then riding with her husband, son and daughter, and threw the plaintiff, with violence, out of said carriage

upon a paved street in the city of Lincoln, and against the iron inlet guard to the city sewer, severely lacerating the plaintiff's right ear and scalp and bruising and wounding her, and thereby causing her physical pain and mental suffering, and rendering her unable to perform her household duties, and putting her to expense in procuring medicines, physicians and nurses. The petition also alleged that the defendant was running said automobile on the left side of the street at the rate of more than 12 miles an hour, and that he gave no sound or warning as he approached the intersection of Eleventh and L streets, as required by rules 2 and 7 of the General Revised and Consolidated Ordinances and Special Ordinances of Lincoln, Nebraska, being a part of chapter 120 of said ordinances. The answer admits the collision, but alleges that the horse attached to the carriage was wild, fractious and unsafe, and that the driver, who was the appellee's son, was unable to manage and control him, and that the horse took fright and ran into the automobile at the intersection of Eleventh and L streets, in Lincoln, and that the automobile, which before that time had been running at a rate of speed not to exceed 3 or 4 miles an hour as it approached said intersection from the north on Eleventh street, being under a complete state of control, was at once slowed up and was standing still when run into by the plaintiff's horse and carriage, and that the horse and carriage left the car after running into it, and that the carriage upset a short distance east of the point of collision, and that the injuries resulting therefrom were caused by the wild and fractious character of the horse and the carelessness and negligence of the driver and his inability to handle and control the horse, and that the appellant used every care and precaution possible, and in no way contributed to the injuries; that the plaintiff, by reason of the vicious character of the horse and the carelessness and negligence of the driver, who was her son, and his inability to manage the horse, caused the injuries complained of. The reply was a general denial of new

matter in the answer. Appellant claims that the evidence fails to prove the cause of action, and attempts to show that the injuries sustained were so sustained because the horse was vicious and unmanageable, and because the plaintiff's driver was unable to control him. Errors at the trial are also alleged.

The horse and carriage were going east on L street at the time the automobile was going south on Eleventh street. The son of the appellant, who had gone to the depot for his mother, and who was driving the family horse and carriage, puts the horse and carriage, by his testimony, half way across Eleventh street at the time he first saw the automobile coming along Eleventh street from the north, and then distant from the carriage he was driving about 400 feet. He was driving on a trot. As Eleventh street is 70 feet between curbs, he had only 35 feet to drive, if he went on straight ahead towards the east, before he would be across Eleventh street and out of the way of the automobile going south. According to his statement, the automobile had more than ten times as far to go as the horse and buggy before it would collide with them if they went straight east across Eleventh street. The husband of the appellee corroborates the son as to the whipping of the horse by the son, and he, by his evidence, puts the horse and carriage about two-thirds of the way across Eleventh street when he first saw the automobile coming, and it was then distant from him about 250 feet, according to his opinion. The daughter of the appellee was riding in the carriage, at the time of the collision, with her brother, at the left of him and on the front seat, and the father and mother were in the back seat of the carriage. The daughter, by her testimony, puts the carriage two-thirds of the way across Eleventh street when she first saw the automobile, which was then in front of the grocery store referred to by the father in his testimony, and about 250 feet north.

Mrs. Roy Young lived at 310 South Eleventh street, over Pfeiff's grocery store, north of the point of collision,

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and about one-half way between the alley and M street. She saw the automobile going south past her window. "Q. He was going at a moderate rate of speed, was he not? A. Well, very slow; not very fast. Q. He was going very slow? A. Yes, sir." If the right hind wheel of the carriage struck the automobile, this could have been done, it would seem, by the carriage turning and going northeast with its right hind wheel next to the automobile. The latter theory is supported by the testimony of De Vore, Spain, Mrs. Herpolsheimer, Mrs. Hoover and the defendant, Dr. Hoover. The defendant, Dr. Hoover, corroborated the statement of Mrs. Young as to the speed of the automobile. He testified that he turned on the brake and stopped the car before the collision occurred, and just as the horse started towards him. Before that he was running slowly. He says that if the horse, attached to the carriage, had gone straight across Eleventh street he would have missed the car by from six to ten feet, but that the horse turned south on Eleventh street, and "all at once the horse wheeled around and made a lunge and came down at an angle as though he was going to plunge right into the car, and, as he got right up close to the car, then he swung right around to the left, kind of doubled around the car, and struck the car; and I had brought my car to a standstill, when his carriage struck me, and, as I say, that he kind of swung around the car, and then ran on—the distance was probably 30 or 35 feet—and the horse started off then a little to the right, again to the south, and there the carriage, it seemed to me, collided with the curb, and the horse went down, and the carriage upset and spilled them all out there." This tends to show that the frightened horse was unmanageable, and that he attempted to, and probably did, go north, and in that way brought the right hind wheel of the carriage in contact with the automobile on the west side of the automobile, and then went around the automobile, perhaps behind it, and turned and went south to the southeast corner of the

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intersection space of the two streets, where the carriage went down. It is in testimony that there were marks on the car.

Lottridge testified that the hind wheel of the buggy ran over the wheel of the automobile and that the buggy did not tip over until it struck the curbstone, which was about 35 feet from where it ran into the automobile. Leslie Keizer testified that when he first saw the automobile it was at the intersection of Eleventh and L streets, and going slow, and that the horse and buggy at first were going east on L street, and all at once the horse turned south on Eleventh street, and then that he turned around towards the automobile, and was going northeast at the time of the collision. He says that when the carriage struck the car it seemed to sway around to the south, and then hit the curb on the corner, and then the carriage turned over; that the right hind wheel of the carriage broke when it hit the curbing or basin. De Vore testified that the horse and carriage were going east on L street, and then that the horse turned south on Eleventh street, and then reared and turned around northeast towards the automobile as though he was going to run into it; that the appellant stopped the car, and the horse sprang around to the south; that the horse was rearing and plunging, and the carriage turned over, and the horse fell near the corner of Eleventh and L, and that the automobile was standing still when struck by the carriage; that the driver was trying to hold the horse, but did not have control of it, and that the horse was rearing and running. Mrs. Louise Herpolsheimer, the appellant's daughter, testified that she was in the automobile, and that the horse was going on a swift trot, and that as he reached the southwest corner of Eleventh and L he broke into a run; that the automobile had been slowed down, and that the car was stopped when the horse broke and ran, and that the horse seemed to run straight for the car, and that when the carriage struck the car it was standing still; that the horse then went to the southeast

corner, where he fell and the carriage upset; that the carriage did not upset when it struck the car; that the carriage struck the right front wheel of the car. The appellant's wife, Mrs. Della J. Hoover, testified that as the horse struck Eleventh street he made a turn as though going south, and then the driver suddenly lost control of him; that the husband slowed down the car, and that the carriage hit the car, and that the horse ran, with the driver trying to hold him; that when he reached the corner he fell, and the carriage went down.

The horse seems to have been badly frightened, and ran when he was whipped, and reared and plunged, and finally went down, and the carriage upset. The right side of the carriage and the automobile were brought together. That the right hind wheel of the carriage was injured and that there were marks on the right front wheel of the automobile tends to corroborate the testimony of the foregoing witnesses for the defendant as to the manner in which the injuries occurred. There is also testimony which tends to show that the horse was skittish and easily frightened, and it is shown that he had before been frightened by a street car which struck him, and the same buggy was overturned and the same woman was injured.

The weight of the evidence clearly shows that immediately upon the horse entering upon the intersection space of the two streets he started south on Eleventh street, apparently to avoid the automobile, then moving south, but the driver began whipping him, and apparently pulled him around until he faced the automobile, which was then northeast of him, and, as the whip was applied, the horse began to plunge and rear, and finally dashed by the automobile, probably on the west side and close enough to it so that the right wheel of the carriage came in contact with the right-hand front wheel of the automobile, and ran over it; the horse and carriage going around the automobile, probably behind it, and then going south 30 or 35 feet to the southeast corner of the intersection space, where the horse fell and the carriage went down and the

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plaintiff was hurt. All the witnesses say the horse went south immediately after entering Eleventh street, except the Tylers; and nearly all, including the driver, say the horse faced northeast towards the automobile immediately before the collision.

The driver, Edward G. Tyler, testified: "I was going northeasterly, would hit the alley back of the Odd Fellows Hall." Lottridge testified that the horse got six or eight feet into Eleventh street, "and made a little turn, as though he was going south. Well, the man that was driving pulled the horse back. That turned him down this way, * * * down northeast, yes. Yes; that would be northeast. Well, the automobile by that time came along here, and the consequence was the buggy ran into the automobile." Leslie Keizer testified: "Well, at first the horse, it was going east on L street, and when it got over by the little fountain it looked like it was going straight across, and all of a sudden it turned. Q. Turned which way? A. South; gave a short turn, and then turned around again and swung over. Q. Towards the automobile? A. Towards the automobile. * * * Q. And in which direction was the horse going at the time of the collision? A. It was going northeast." J. S. De Vore testified: "We were going south on Eleventh street, and Mr. Tyler was on L street, coming into Eleventh, and as the horse came into Eleventh he turned south; he was going south, and then he reared up, and swung right around, and came right kind of northeast, I should think right towards the automomible, as though he was going to run right onto it. * * * Q. The carriage struck the front wheel of what? A. The automobile. Q. What do you say happened to the carriage? A. That wheeled the carriage to the front. The horse was rearing and plunging, and fell down, just when they got over about the corner of Eleventh and L, and then the carriage turned over." A. J. Spain testified: "Well, I was standing on the northeast corner next to the Odd Fellows Block, with my little boy, and I saw the machine coming up Eleventh

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street, and I also noticed a horse and buggy—a horse and carriage—coming east on L street, and I noticed the carriage as it came to the corner. I noticed the horse make a sort of a turn south. He was going south on Eleventh street. * * *

Mr. Hoover turned the wheels of the automobile to the east in order to let the buggy slide by.

* * * The buggy did not tip clear over until it struck the east side of the crossing or the curbstone, and I ran right to Mrs. Tyler, and I was the first one to her, excepting Mr. Tyler.” Mrs. Herpolsheimer testified: “Well, we were going south on Eleventh, on the west side of the street. As we approached L street, we were going at a moderate rate of speed. As we approached L, the horse and carriage in question was seen coming from L, going east. * * * When the horse broke and ran, the car was stopped. The horse then made straight for it. When the horse and carriage struck the automobile, the automobile was still. The carriage was not upset. On the contrary, the horse then went on back to the southeast corner. There the horse fell right at the crossing, and the carriage with it, and they spilled out. * * *

Q. What would you say as to the horse being scared or unmanageable? A. He was certainly frightened, and I think he must have been unmanageable, or he would not have come into the car. Q. What did the horse do just before he came to the car? A. Plunged. Q. I know; but

what direction did he take? A. Northeast. Q. He did not jump into the car, did he? A. Well, he ran right for it. Q. I know, but what did he do when he got to the car?

Where did he go with reference to the car? A. Why, he went right around the front end of the car, and a little bit to the north, and then, of course, they pulled him around the other way. Q. So that the horse missed the car? A. I don't think that the horse struck the car, but the carriage did. * * *

Q. Which wheel of the automobile did the carriage collide with? A. The right-hand front wheel. That would be on the west side.” Mrs. Della J. Hoover

testified: “As we came up Eleventh street nearly to L—

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I could not say just the distance—I noticed Mr. Tyler's carriage coming east, and, as they struck Eleventh street, the horse made a little turn, as though he was going to go south. My husband saw the horse there and the way he was doing, and really we thought he was going south, and then he made a sudden turn. It looked to me as though he was going south, and then he suddenly dashed around, and I think the horse—the young man lost control of it. * * * My husband slowed the car down; and it came to me—it looked as though they were going to dash right into the car. I was very much frightened. Well, it came out, and they did strike us, and we had stopped. They struck us, hit the car, and then the horse ran on. The young man was holding on and trying to control him, and they went across the street to the corner. They went several feet. Now, I can't tell you how many feet; but they went over there. The horse fell, the carriage went down, and the occupants were all spilled out, of course." Dr. A. L. Hoover, the defendant, testified: "The horse seemed to be excited, and I grabbed the lever of my car. * * * I grabbed the lever so as to control my car, slowed it down, and watched what they were going to do, and as their horse came onto Eleventh street he turned south. He was going to turn south on Eleventh street, made quite a decided turn, and all at once the horse wheeled around and made a lunge and came down at an angle as though he was going to plunge right into the car; and, as he got right up close to the car, then he swung right around to the left, kind of doubled around the car, and struck the car, and I had brought my car to a standstill when his carriage struck me, and, as I say, that he kind of swung around the car, and then ran on. The distance was probably 30 to 35 feet, and the horse started off then a little to the right, again to the south, and there the carriage, it seemed to me, collided with the curb, and the horse went down, and the carriage upset and spilled them all out there."

The great weight of the evidence is that the defendant

was proceeding slowly on Eleventh street, and that immediately after entering upon the intersection space of Eleventh and L streets he stopped his machine, which was standing still a little west of the center line of Eleventh street, with the front near the center line of L street, when the collision occurred. The machine was not in motion when the carriage collided with it. The horse was apparently badly frightened and was very unmanageable. The defendant contends that the cause of the collision and injuries was the unmanageable character and conduct of the horse, together with his driver's lack of skill and strength or judgment, and that he drove northeast towards the automobile, instead of keeping away from it, or he permitted the horse to go in that direction, and so the collision was brought about.

If equally capable men, carefully considering the evidence, may honestly differ as to the facts of the case, then it is one peculiarly adapted to the jury, and their verdict should stand, even though this court should unanimously conclude that a different verdict ought to have been reached, but is at the same time of the opinion that the verdict is not against the weight of the evidence. It may sometimes seem to be a narrow and uncertain line which determines the reviewing court to follow after the weight of evidence, instead of following that which seems to barely preponderate; but this line should at all times be visible to a discriminating and courageous court, willing to limit itself to its own proper province, and not to invade that field of inquiry which relates only to finding the facts by ascertaining a preponderance of the evidence, and which belongs, and should belong, exclusively to the jury. If a careful examination of the evidence shows that the material contentions of the plaintiff are clearly not sustained, the verdict and judgment cannot be right, and are therefore wrong, and the judgment should be set aside.

This court has recently said, in *O'Chander v. Dakota County*, 90 Neb. 3: "The rule is well established that

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where, as in the case at bar, there is a conflict of evidence upon the material facts, touching the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict of a jury or the findings and judgment of a trial court." And in *Smith v. McKay*, 90 Neb. 703, the first paragraph in the syllabus reads: "The finding of a jury on conflicting evidence will not be disturbed on appeal unless manifestly wrong." In *Kafka v. Union Stock Yards Co.*, 87 Neb. 331, this court adhered to the view that, "if different minds may reasonably draw different conclusions or inferences from the state of facts established by the evidence in a cause, whether such facts show negligence or contributory negligence is not a question of law for the court, but must be submitted to the jury. *Omaha Street R. Co. v. Lochneisen*, 40 Neb. 37, followed." *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 729; *Shirley v. City of Minden*, 84 Neb. 544; *Hair v. Chicago, B. & Q. R. Co.*, 84 Neb. 398; *Crabtree v. Missouri P. R. Co.*, 86 Neb. 33." In *Kafka v. Union Stock Yards Co.* the opinion contains liberal quotations from the evidence taken, and shows that this court most carefully looked into the evidence to ascertain what the facts really were, and made its determination after it ascertained that there was clearly a conflict of the evidence on the material questions involved in the case. The opinion was delivered by Judge LETTON.

In *Garfield v. Hodges & Baldwin*, 90 Neb. 122, this court declared in the first paragraph of the syllabus: "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial ordered." That case originated in a tombstone business, where every man employed by the business seems to have been his own boss. There was a large stone, which was denominated A, and it was nearly evenly balanced upon a supporting stone with a sharp edge, and being steadied against the west side of a large post. Another stone, de-

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nominated B and weighing about a ton, was placed on top of the stone A. There was nothing to prevent this stone from toppling and falling to the west if only a small amount of weight was placed on the west half of either of said stones. The deceased was in the employ of the defendants, and in the course of his duties went to the yard to get a stone weighing several tons, and denominated C, and lying immediately south of and adjacent to the two stones A and B. The deceased and his brother were lifting the stone C by means of a chain around the same and attached to a traveling crane and a rope running over a pulley. Both were on the north side of C and immediately west of A and B. After C had been lifted to a certain height, the deceased, to obtain a better hold upon the rope, stepped upon the stones A and B, and they, being in a balanced condition, were by his weight tipped downwards to the west, and the upper stone sliding off its blocks fell over and upon the deceased, crushing his leg and inflicting injuries which caused his death. Plaintiff claimed that the defendants permitted the two stones A and B to remain in the dangerous condition set forth for five or six weeks, and that the deceased was injured through their negligence, and through no fault of his own. There was a failure to prove the specific acts alleged. This court said: "When he went out that morning to get stone C, he went on his own initiative; he was right beside and had a plain view of stone A; and, if stone B was then resting upon stone A, the dangerous condition of the two stones could be plainly seen by him. * * * The deceased was in duty bound to have noted their dangerous condition and to have guarded against it. * * * He could not carelessly and negligently shut his eyes to or ignore the dangerous situation which confronted him, and charge the defendants with his own negligent act. Having elected to proceed with his work in the face of the dangerous situation or conditions from which his injury resulted, we know of no theory upon which his administratrix can recover. * * * The rule is well settled in

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this state that, where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside and a new trial granted." In that case, Judge FAWCETT, delivering the opinion of this court, seems to have made a careful examination of the evidence, and the opinion shows, as does the opinion in the case of *Kafka v. Union Stock Yards Co.*, *supra*, that this court will carefully analyze the testimony with a view to ascertaining whether there is a mere conflict of evidence, or whether the verdict and judgment are sustained by the evidence.

In *Christensen v. Tate*, 87 Neb. 848, the question was whether the plaintiff should recover damages for personal injuries and for damage done to his horse and buggy because of the negligence of the defendant in driving his automobile along one of the streets of Fremont. In that case the defendant testified that he (the defendant) turned around a bill board while driving his machine, and, as he did so, he noticed the horse "looked up, as though he was going to be frightened," and that he then turned out into the ditch, and gave the plaintiff the full road, and stopped his machine, but the plaintiff denied that the defendant stopped his car at all. This court said, Judge SENGWICK delivering the opinion: "It was fully shown by many witnesses that at the place of the meeting in question 10 or 12 miles an hour would be a highly dangerous rate of speed. In view of the fact that the defendant was a witness in his own behalf and did not testify as to the rate of speed he was driving when he met the plaintiff, we cannot say that the finding of the jury is unsupported by the evidence." In the syllabus, the sixth paragraph reads: "It is found upon examination of the record that the evidence is sufficient to support the verdict and judgment." The fair implication is that the reviewing court will look into the evidence, and, if there is simply a conflict of evidence, the verdict and judgment will be allowed to stand, but not where they are clearly against the weight of the evidence.

The automobile furnishes an improved method of travel. It is to be welcomed as a saver of time and a protection to man's favorite domestic animal, the horse, against long drives. It is said to be in use in all civilized countries, and it has come to stay. We are told that there are 750,000 automobiles in use in the United States alone. The law therefore does not denounce the use of an automobile on a public highway, and the appellant is not guilty of negligence because he used one on the streets of the city of Lincoln. It would be improper to say that the driver of a horse attached to a carriage has rights in the road superior to the rights of the driver of the automobile, as both have a right to go upon the public highway, and each is restricted in the exercise of his rights by the corresponding rights of the other, and each is entitled to regulate his use of the public streets and roads by observance of ordinary prudence under all circumstances. If the driver of an automobile sees that a horse driven to a carriage is restive and frightened, it would seem that he should take such course to avoid inflicting an injury as the dictates of ordinary prudence may demand. He should reduce the speed of his vehicle, or stop it, if requested to do so, or if he sees that this is necessary to avoid an accident. *Indiana Springs Co. v. Brown*, 165 Ind. 465, 1 L. R. A. n. s. 238; *Gue v. Wilson*, 87 S. Car. 144, 69 S. E. 99. In this case the defendant was not requested by the driver of the horse to stop, and therefore was not bound to do so, unless ordinary prudence required it; but he was not relieved from the duty of exercising ordinary care to prevent injury to the occupants of the carriage.

The restrictions which the law imposes upon all modes of travel upon the highways are such as tend to secure to the general public the largest enjoyment thereof, and must be observed and borne by all alike upon the broad ground that all have an equal right to travel in safety; and, when accidents happen as incidents to reasonable use and reasonable care, the law affords no redress. The fact that a horse becomes frightened by a motor vehicle

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upon the highway does not render the operator of such vehicle liable for resulting injury, as the horse has no paramount or exclusive right to the road; and the fact that a horse takes fright at a vehicle run by a new and improved method, and smashes things, does not of itself give the injured party a cause of action. Davids, Law of Motor Vehicles, sec. 125.

In *Nason v. West*, 65 N. Y. Supp. 651, it is said, among other things: "Horses may take fright at conveyances that have become obsolete, as well as at those which are novel; but this is one of the dangers incident to the driving of horses, and the fact cannot be interposed as a barrier to retrogression or progress in the method of locomotion. Bicycles used to frighten horses, but no right of action accrued. * * * Electric street cars have caused many runaways. Automobiles operated without steam, by storage batteries or by gasoline explosive engines, running at a moderate speed, may cause fright to horses unused to them; yet the horses must get used to them, or the driver take his chances."

It is contended by the defendant that he was driving in his automobile at the rate of from four to six miles an hour, and that he slowed up as soon as the horse and carriage entered the intersection space of the two streets, and that he has been guilty of no negligence. A careful reading of all the evidence in the case compels us to find that the verdict is clearly against the weight of evidence. Our supreme court reports contain many hundred cases where the verdict and judgment have been set aside because of the insufficiency of the evidence. The most recent of these cases are *Rockwell v. State*, 90 Neb. 744; *In re Estate of Paisley*, 91 Neb. 139; *Bartels v. State*, 91 Neb. 575; *Carlos v. Hastings Independent Telephone Co.*, 91 Neb. 538; *Fitzgerald v. State*, 91 Neb. 481; *Gering v. Leyda*, 91 Neb. 430.

The seventh instruction given by the court upon its own motion reads: "If you determine from the evidence and under these instructions that the defendant was

negligent in one of the respects alleged in plaintiff's petition, as set out in the first paragraph of these instructions, and if you further determine from the evidence that the defendant's said negligence proximately contributed to the injuries of the plaintiff, then you should direct your attention, among other things, to the claim of the defendant that the plaintiff was guilty of contributory negligence, or, in other words, that the plaintiff by her negligence proximately contributed to the injuries done her. Contributory negligence is a part of the defendant's case, and the burden of proof is upon the defendant, unless you find that plaintiff in making her own case has shown such contributory negligence, to prove by a preponderance of the evidence that the plaintiff was guilty of such contributory negligence. In this particular, you are further instructed that if the horse which, at the time of the accident, was being driven by plaintiff's son was a fractious, dangerous and unsafe animal, and that the plaintiff's injuries were proximately caused, even in part, because of that fact, then that would constitute contributory negligence on the plaintiff's part. On the other hand, any negligence of plaintiff's son in the management of the horse would not constitute negligence on the plaintiff's part, and she would not be responsible therefor. In any event, if you find that plaintiff was guilty of contributory negligence, which proximately contributed to her injuries, she cannot recover in this action."

The jury must have been misled by the following sentence contained in the instruction above quoted: "On the other hand, any negligence of plaintiff's son in the management of the horse would not constitute negligence on the plaintiff's part, and she would not be responsible therefor." The foregoing sentence would seem to be clearly wrong and misleading and in a high degree prejudicial to the defendant. The plaintiff's son, with plaintiff's consent, was driving the family horse and carriage. All the members of the family were with him. Presumably he was driving as the plaintiff and her husband desired him

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to drive, because they were with him. If the plaintiff had herself driven the horse and buggy in such a negligent and careless way as to bring about the collision and the injury, she would be the direct cause of the injuries suffered, and she could not recover damages because of her own carelessness and negligence. The plaintiff's son, for the time being, was the plaintiff's servant. He had gone to her stable and got out the family horse and buggy to bring her from the railroad station. It was her journey that was being made. It was made by her by and with the assistance of her son and husband. Suppose that she herself had driven the horse and buggy against the automobile, and that the horse then turned and ran until it fell, would it be possible under these circumstances that anybody could seriously think that she ought to recover for her carelessness, negligence or inability to control a fractious or an exceedingly timid horse? The all-important question to be determined is: Who is to blame for the collision and injuries which are the direct result thereof? If the thing which happened would not have happened except for what the plaintiff did through her son, then she certainly cannot recover. What her son did must be attributed to her, because he was her servant or agent, and it is immaterial which he was. The plaintiff was herself guilty of negligence, and therefore should not recover. *Hajsek v. Chicago, B. & Q. R. Co.*, 5 Neb. (Unof.) 67; *Aurelius v. Lake Erie & W. R. Co.*, 19 Ind. App. 584; *Cunningham v. City of Thief River Falls*, 84 Minn. 21; *Wosika v. St. Paul City R. Co.*, 80 Minn. 364; *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16; *Brickell v. New York C. & H. R. R. Co.*, 120 N. Y. 290; *Chicago Union Traction Co. v. Leach*, 215 Ill. 184; Beach, *Contributory Negligence* (3d ed.) sec. 115.

If the plaintiff's son drove into the automobile of defendant, then the defendant is not liable, because he is not responsible for the collision. There is no liability of the defendant, whether the act done is regarded as the act of the plaintiff or the act of her son. She cannot be held

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free from responsibility for the negligence of the driver, and the instruction is most misleading. *Koplitz v. City of St. Paul*, 86 Minn. 373; *Cunningham v. City of Thief River Falls*, 84 Minn. 21; *Wosika v. St. Paul City R. Co.*, 80 Minn. 364; *Town of Knightstown v. Musgrove*, 116 Ind. 121; *Kessler v. Brooklyn Heights R. Co.*, 3 App. Div. (N. Y.) 426; Beach, *Contributory Negligence* (3d ed.) sec. 115a; 29 Cyc. 543.

It is urged by appellant that the verdict is the product of bias and prejudice upon the part of the jury, and in support thereof it is stated that it appears from the affidavits of three of the jurors that they understood from the remarks of the court, urging the jury to agree upon a verdict, if possible, and from the conduct of the attorneys of the respective parties, whom the trial judge called to his desk, and with whom he held a private consultation, that it was the desire, both of the court and the attorneys, that there should be no disagreement, and that a verdict of some kind should be returned, and therefore, solely by reason of that fact, they consented to join in the verdict rendered; that they would not have done so but for the reason that they were influenced by the remarks of the court and what took place between the court and the attorneys. We do not pass upon this question, because compelled to grant a new trial for the reasons above specified.

The judgment of the district court is

REVERSED.

SEDGWICK, J.

I concur in the result reversing the judgment.

FAWCETT, J., concurring in part.

I concur in so much of the opinion as holds that the evidence does not establish negligence on the part of defendant. This being true, there is no question of contributory negligence in the case. There cannot be such a thing as contributory negligence by one party where there is no negligence by the other.

LETTON, J., concurring in part.

I concur in the view that the judgment should be reversed as unsupported by the evidence. It is my view, however, that the duties of the driver of a motor vehicle with respect to meeting or passing horse-drawn vehicles are laid down in sections 6235, 6236, Ann. St. 1911 (Comp. St. 1911, ch. 78, secs. 146, 147), and that, unless the accident is caused in some other manner than by a violation of these rules, the court is bound by the police regulations established by the legislature and should adhere to the same. As to other points decided I express no opinion.

ROSE, J., dissenting.

It seems to me there is sufficient evidence of defendant's negligence to justify the action of the trial court in submitting that issue to the jury. I do not concur in the reversal for any reason given in the opinion, and therefore dissent.

REESE, C. J., dissenting.

The evidence in this case is conflicting, although seemingly preponderating in favor of defendant. It is my view that the question of the weight of the testimony is for consideration and decision by the trial jury, and not for this court. While, had I been called upon to determine the case upon the preponderance of the evidence, I probably could not have agreed to the verdict, it is the well-settled law that in such cases the verdict of a trial jury should close the inquiry.

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MARY F. L. PAGE, APPELLANT, V. CHARLES P. BRESEE ET AL., APPELLEES.**FILED NOVEMBER 1, 1912. No. 16,779.**

1. **Mortgages: FORECLOSURE: MISNOMER.** By actual personal service of summons upon the mortgagor, who is also the owner of the equity of redemption, in an action to foreclose a mortgage, the court obtains jurisdiction; and a mistake in the name of the defendant, which is not brought to the attention of the court by motion or plea in abatement, does not deprive the court of its jurisdiction, or render a decree foreclosing the mortgage subject to collateral attack.
2. **Taxation: FORECLOSURE OF LIEN: UNKNOWN HEIRS: CONSTRUCTIVE SERVICE.** In an action for the foreclosure of a tax lien against unknown heirs, a substantial compliance with the provisions of section 83 of the code, an order of the court for service by publication upon such unknown heirs, and a legal publication of summons thereunder, is sufficient to confer jurisdiction upon the court to render a decree of foreclosure.
3. ———: ———: **CONSTRUCTIVE SERVICE: AFFIDAVIT.** In an action by a county against unknown heirs to foreclose its tax lien, the affidavit for service by publication, as provided by section 83 of the code, may be made by the county attorney.
4. ———: ———: **IRREGULARITIES.** Where the court has obtained jurisdiction, mere informalities of procedure will not subject the decree of foreclosure to collateral attack.

APPEAL from the district court for Sheridan county:
WILLIAM H. WESTOVER, JUDGE. Affirmed.

Albert W. Crites, for appellant.

Allen G. Fisher, A. M. Morrissey and William P. Rooney, contra.

BARNES, J.

Action to redeem the southeast quarter of section 10, township 33 north, range 44 west, situated in Sheridan county, from tax sale under a decree of foreclosure, in

which the county of Sheridan was plaintiff, and the unknown heirs of one Charles J. Chapman, deceased, were defendants, and quiet the title thereto in the plaintiff. It appears that one Charles J. Chapman had previously, in his lifetime, obtained title to the land in question under a decree of the district court for Sheridan county foreclosing a mortgage on the premises. The plaintiff, Mary F. L. Page, claimed title thereto by a deed from the original entryman, one Johann F. M. Laue, while defendant Bresee derived his title under the tax decree of foreclosure above mentioned; and defendant Walter Morse claimed an interest in the premises as mortgagee. On the trial the district court for Sheridan county found generally for defendant Bresee, and dismissed the plaintiff's action. From that judgment the plaintiff has appealed.

1. Plaintiff's first attack is centered upon the mortgage foreclosure decree, under which Charles J. Chapman obtained his title to the premises in question. It is claimed that that decree was void for the reason that the mortgagor was sued by the wrong name. It appears that title to the mortgaged premises was obtained by one Johann F. M. Laue from the United States government; that his entry and final receiver's receipt described him as "John F. M. Lowe;" that he thereafter executed the mortgage on which the foreclosure was based, and in which he was named as "John F. M. Lowe," but which he signed in German script as Johann F. M. Laue. It further appears that personal service of summons was duly made upon both Laue and his wife in the mortgage foreclosure suit; that they failed and neglected to appear or answer or in any manner direct the attention of the court to the alleged misnomer. It follows that the decree of foreclosure was not void, and therefore is not subject to collateral attack. *Smelt v. Knapp*, 16 Neb. 53; *Kronski v. Missouri P. R. Co.*, 77 Mo. 362; *Whitcomb v. Hooper*, 81 Fed. 946; *Davis v. Jennings*, 78 Neb. 462. We are of opinion that Charles J. Chapman obtained title to the premises in question by the sheriff's deed based on the foreclosure decree.

2. Plaintiff attacks the decree foreclosing the tax lien upon the premises in question, and contends that the decree was void for reasons hereinafter stated. It appears, however, that when that suit was commenced Charles J. Chapman was made the defendant as owner of the land, and the fact of his death was not ascertained until after a decree of foreclosure was rendered; that when that fact was ascertained the decree was set aside and held for naught. The petition was thereupon amended by making the unknown heirs of Charles J. Chapman the defendants therein; that the plaintiff, by its county attorney, made an affidavit and filed the same in compliance with the provisions of section 83 of the code, which provides that in actions where it shall be necessary to make the heirs of any deceased person defendants, and it shall appear by affidavit of the plaintiff annexed to his petition that the names of such heirs and their residence are unknown to the plaintiff, proceedings may be had against such unknown heirs without naming them, and the court shall make such order respecting service as may be deemed proper. If service by publication be ordered, the publication shall not be less than four weeks; that upon the filing of the affidavit the district court continued the cause, and ordered service of summons by publication upon the unknown heirs of Charles J. Chapman, deceased. It is claimed that the county attorney was not authorized by any statutory provision to make such an affidavit; that it was not annexed to the original petition; that it was not sufficient in form and substance to authorize the court to order service by publication upon unknown heirs; that the order of the court in that behalf was defective and insufficient; that the decree based upon the service thus ordered was void; and that the purchaser under the decree obtained no title to the land in question. In support of this argument plaintiff cites *Stull v. Masionka*, 74 Neb. 322, where it was said: "Where a defendant is sought to be brought into court by some method prescribed by a statute, other than personal service, which notice may or

may not reach him, and which is more or less unsatisfactory, the statutory provisions relating to such service are construed with strictness, and it is incumbent that all steps in the process required to be taken shall be followed with substantial accuracy." In that case, however, the decree of foreclosure was sustained on the ground that there was a substantial compliance with the provisions of the statute authorizing service by publication. In the instant case there was an attempted compliance with every requirement of section 83, and, while the proceedings were in some respects somewhat informal, still we are of opinion that there was a substantial compliance with the terms of the statute.

3. It is contended that the county attorney of Sheridan county, who made affidavit for service of summons upon the unknown heirs of Charles J. Champan, deceased, could not make such affidavit. We think, however, that the words "appear by the affidavit of the plaintiff," as found in section 83 of the code, are not to be taken so literally as is contended by plaintiff. Such a construction would prevent a corporation or partnership from maintaining the action. We are of opinion that the plaintiff may make it appear by his own affidavit; or from the affidavit of an attorney, especially in cases where the plaintiff is a corporation, as in this case, and could not make such an affidavit. We therefore hold that the affidavit may be made by the county attorney, who is the official law officer of the county.

There having been a substantial compliance with all statutory provisions in the tax foreclosure suit, the decree rendered therein is not subject to collateral attack. The effect of that decree, as declared by statute, was to create a new and independent title to the land in question. It divested the heirs of Charles J. Chapman of all their interest therein, and transferred the same by such independent title to the defendant who was the purchaser at the foreclosure sale.

4. Finally, it appears that the defendant by his answer

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properly pleaded the statute of limitations as one of his defenses, and the record discloses that the sale under the decree foreclosing the tax lien was confirmed on the 6th day of September, 1901, and the sheriff thereupon made a deed to the defendant as such purchaser. By the provisions of our revenue laws, the right of redemption from a decree foreclosing a tax lien is barred after the expiration of two years from the confirmation of sale. The fact that the plaintiff also prays for a decree quieting title does not of itself toll the statute. It is quite probable that the district court was of opinion that the plaintiff's cause of action, which was commenced on the 3d day of April, 1908, was barred by the statute of limitations. There was a general finding for the defendant, and an examination of the record satisfies us that the evidence was sufficient to warrant such a finding and sustain the decree appealed from.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

**HANS CHRISTENSEN, APPELLEE, V. OMAHA ICE & COLD
STORAGE COMPANY, APPELLANT.**

FILED NOVEMBER 1, 1912. No. 16,784.

1. **WATERS: DRAINAGE: ACTION FOR DAMAGES.** It is the duty of one who uses, maintains and controls a ditch for the purpose of lowering the waters of a lake or pond to a navigable river to erect and maintain a dam at the outlet of the ditch sufficient to prevent the flood-waters of the river from entering it and overflowing the lands owned by other persons adjacent thereto.
2. ———: ———: ———. Where such dam is negligently constructed or maintained, and by reason thereof farm lands in the vicinity of the ditch are overflowed, and crops growing and personal property situated thereon are injured and destroyed, the person or corporation having the control, management and use of such ditch and dam is liable for the damages caused thereby.

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3. ———: ———: ———: LIMITATIONS. In such a case, the cause of action arises when the damages are sustained.
4. ———: ———: ———: DEFENSES. The fact that the ditch and dam are situated upon lands owned by persons other than the defendant is no defense to such an action, where it is shown that defendant freely exercises the use, control, operation and management thereof in the prosecution of his own private business.
5. INSTRUCTIONS. The substance of instructions given and refused by the trial court are stated in the opinion, and the rulings thereon are held to be without error.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

Brown, Baxter & Van Dusen, for appellant.

Benjamin S. Baker and *S. A. Searle*, *contra*.

BARNES, J.

Action by plaintiff, the lessee of a tract of farm land situated between what is known as Cut-off lake and the Missouri river near to and east of the city of Omaha, for damages to his growing crops and personal property caused by the flood-waters of the river alleged to have been thrown upon the premises by failure of the defendant to properly maintain a ditch leading from the lake to the river for drainage purposes, and a dam constructed therein to prevent the flood-waters of the river from flowing from that stream into the lake. On the trial in the district court for Douglas county the plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that about the year 1898 David Talbot and E. W. Lamoreaux, who were the incorporators of the defendant company, were conducting the business of cutting and storing ice on the banks of Cut-off lake; that at times of high water in the lake their ice houses were partly submerged, and the ice stored therein was destroyed; that, to obviate that trouble, they constructed a ditch in an

easterly direction from the lake to the Missouri river, and cut the same through the high bank of that stream, which had theretofore been a safe and sure barrier to its flood-waters, and had prevented them from reaching the land between the river and the lake; that when the water in the river was low the ditch drained the lake and lowered the stage of the water sufficiently to protect the ice houses above mentioned; that when that purpose was accomplished a dam was constructed across the ditch near its mouth sufficient to prevent the flood-waters of the river from entering the ditch in question; that when it again became necessary to lower the water in the lake the ditch was cleaned out and the dam removed, and when the lake was sufficiently lowered the dam was replaced. It also appears that the defendant was incorporated in December, 1901, and took over the property rights and business of the former owners, who were thereafter members, officers and managers of the corporation; that from thence to and including the year 1905 the defendant company conducted its business in relation to the management of the ditch and dam above described in the same manner as it had theretofore been conducted; and there is sufficient evidence in the record to sustain a finding that the defendant had frequently cleaned out the ditch, taken out the dam, drained the lake, and thereafter on each occasion had replaced that structure. It also appears that in July, 1905, the flood-waters of the Missouri river, by reason of the negligent reconstruction and maintenance of the dam, broke through and washed away that structure, and flowed back through the ditch in such volume as to overflow its banks and flood the plaintiff's premises, destroying his growing crops, together with a large amount of his personal property.

1. It is strenuously argued that the evidence is not sufficient to sustain the judgment because it does not show that defendant reconstructed the dam at the outlet of the ditch in question in the year 1904. In disposing of this contention, it is sufficient to say that the evidence clearly

shows that the defendant company cleaned out the ditch and used it to drain the lake in 1903 and 1904. To do this necessarily required the removal of the dam. It appears that it was negligently replaced by some one; and, in any event, it was the plain duty of the defendant to reconstruct it in such a manner as to protect the lands adjacent to the ditch from inundation by the flood-waters of the Missouri river. A failure to perform that duty rendered defendant liable for resulting damages.

2. It is also contended that defendant was not the owner of the land through which the ditch was dug and on which the dam was constructed, but was a trespasser thereon, and therefore it was not liable for its failure to properly maintain the ditch and reconstruct the dam after using them for the protection of their ice houses. We find nothing in the record showing, or tending to show, that defendant was denied the right to construct the ditch and dam in question by the owner or owners of the land on which they were situated. But, on the contrary, it appears that defendant has at all times exercised the right to enter upon the premises when it became necessary to do so for the protection of its own property. If defendant could exercise such right, it necessarily assumed the duty of so exercising it as not to thereby injure the property of others. We are therefore of opinion that this contention cannot be sustained. *Reams v. Clopine*, 78 Neb. 166.

3. It is also contended that the right of action, if any existed for defendant's acts, accrued when the ditch was dug and the dam was first constructed in 1898, and was therefore barred by the statute of limitations. This defense was not pleaded, and, if it had been made an issue, could not have been maintained. The action was not one for permanent injury to the land, leased by plaintiff, but was one for damages to his growing crops and personal property, caused by the negligent reconstruction and the maintenance of the ditch and dam; and the plaintiff's right of action accrued when his property was injured and de-

stroyed. *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456. In that case it was said: "The right to damages for an obstruction of a stream by an insufficient culvert or drain does not accrue when the railroad is built, but when the overflow actually results."

4. The defendant requested the district court to instruct the jury, in substance, that there was no evidence that the David Talbot Ice Company, which constructed the ditch and dam in question, sold or transferred any right thereto or therein to the defendant; that there was no evidence produced as to who were the associates of David Talbot; that they having constructed the ditch and dam in 1898, some years before the organization of the defendant company, the defendant could not be held responsible for the acts of David Talbot and his associates in digging the ditch in question.

For the reasons heretofore stated, it is apparent that the court did not err in refusing defendant's instructions. It seems equally clear that the district court properly refused to instruct the jury to return a verdict for the defendant at the conclusion of all of the evidence.

5. It is contended that the court erred in giving paragraph four of the instructions upon his own motion. An examination of that instruction discloses that it fairly and clearly stated the issues presented by the pleadings, and informed the jury that, if they found the plaintiff had proved all of the allegations of his petition, enumerating and describing them, by a preponderance of the evidence, their verdict should be for the plaintiff. In this there was no error.

Finally, it appears from a careful examination of the whole record that the case was fairly tried, that the evidence is sufficient to sustain the verdict, and, no error appearing in the record, the judgment of the district court is

AFFIRMED.

ROY CROWDER, APPELLEE, v. TOLERTON & WARFIELD COMPANY, APPELLANT.

FILED NOVEMBER 1, 1912. No. 16,810.

1. **Sales: OFFER: ACCEPTANCE.** An order for goods, wares or merchandise sent to a wholesale or jobbing house, at the solicitation of its traveling salesman, which provides in express terms that it is subject to the approval of the home office, does not become a binding contract until it is approved and accepted.
2. ———: **RESCISSION.** Where the person making the order, upon being notified of its nonacceptance, demands and receives a repayment of the money forwarded therewith, he thereby rescinds his order, and cannot maintain an action thereon for damages for its nonacceptance.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Reversed.*

Albert W. Crites, for appellant.

J. E. Porter, contra.

BARNES, J.

Action to recover damages for an alleged breach of contract for the sale of a soda fountain. The action was commenced in the justice court of Dawes county, where plaintiff had the judgment. Defendant appealed to the district court, where, on a trial without a jury, the plaintiff again had judgment for the sum of \$120, and to reverse that judgment the defendant has appealed to this court.

It appears that on the 9th day of March, 1908, at Crawford, Nebraska, plaintiff gave an order for a soda fountain to one J. H. Meyer, defendant's traveling salesman, which reads as follows: "Crawford, Neb., 3-9, 1908. Manufacturers of and Dealers in Soda Water Apparatus & Supplies. Tolerton & Warfield Co. Please furnish the following goods on the terms and conditions mentioned below: Title to said goods to remain with ——— until

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all payments are made. Ship on or about April 1st, 1908, via C. & N. W. & Burlington, to Roy Crowder, town—Crawford, State—Neb. As evidence of good faith, I herewith make a cash payment of \$25.00, receipt of which is hereby acknowledged, and upon receipt of bill of lading or tender of goods, I will honor sight draft or other demand for \$——, and the balance I promise to pay in monthly sums as follows: \$10.00 each month beginning May 1st, 1908, privilege of paying full amount at a discount of 5% by Jan. 1st, 1909, with interest at 6 per cent. on each payment from date of shipment, and for such balance and interest will execute and deliver contract notes of like tenor and form to the one printed on the back of this order and maturing as above set forth, and will execute such other papers as may be necessary under the laws of this state to protect your title to said goods. The delivery of said apparatus, etc., to be conditional upon the compliance with the above terms and conditions. There are no other conditions with your salesman except as herein stated. All goods f. o. b. Decatur, Ill. All orders and contracts secured by any representative of this company are subject to approval by the home office, and contingent on labor difficulties, fires or other unavoidable delays.” There followed a description of the fountain and fixtures, and the price thereof was stated to be \$300. The order was signed by the plaintiff, who thereafter forwarded it, together with his check for \$25, to the defendant, and stated in his letter that, according to the agreement, the fountain was to be in Crawford by the 15th or 20th of April.

On receipt of the order, the defendant refused to accept it for several reasons, among which was that the price should have been \$350 for the fountain, instead of \$300, as named in the order, and wrote a letter to their salesman, Meyer, telling him that they could not accept the order, and asked him to take the matter up personally with plaintiff, and readjust the matter in conformity with a copy of an order which they inclosed to him.

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It appears that Meyer called upon the plaintiff and informed him that he, Meyer, had "balled" the order all up, and asked plaintiff to make out a new order; that the defendant, on the 8th day of April, 1908, forwarded to the plaintiff a new order, in which the price of the soda fountain was fixed at \$350. On receipt of the new order, the plaintiff refused to sign the same, and sent the following telegram to the defendant: "Crawford, Neb., April 8, 1908. Tolerton & Warfield, Sioux City, Ia. Ship goods ordered or return check. Wire particulars. Something must be done. Waited long enough. (Signed) Roy Crowder."

On April 10, 1908, plaintiff wrote a letter to the defendant, in which, among other things, he said: "Now, if you want to sell me this fountain, I want to know what I am getting. Do I get a steel fount with this complete outfit? If I get this I will order this outfit on receipt of message from you to-morrow. If not, return my check at once, as I think you have had it long enough, I have another place. This fountain is to get here by 1st of May. (Signed) Roy Crowder."

Upon receipt of this letter, the defendant, having cashed plaintiff's check for \$25 pending negotiations, sent the plaintiff a draft for \$25 in a letter apologizing to him for the mistakes and misunderstandings between them, and informing him that they would have Mr. Meyer take the matter up with him again on his next trip to Crawford. Defendant also stated in the letter that it always had the option of whether to ship goods or not when an order was taken by its salesmen, and that it had exercised that privilege for the reason that it could not afford to sell him a \$350 outfit for \$300. We have not stated all of the correspondence that passed between the parties, but have given the substance of it. When the plaintiff received the draft for \$25 in repayment of his check, he wrote the defendant, stating that he refused to accept it, but would sue for damages for failing to comply with the terms of his order. It appears that he kept and cashed the draft, and

claimed upon the trial that he had credited the amount of it on his claim for damages. It appears that this was done, however, without the consent of the defendant.

The evidence contained in the bill of exceptions is in nowise conflicting, and clearly establishes the facts above stated. It is contended, among other things, that defendant was entitled to a judgment dismissing plaintiff's action because the evidence fails to show an acceptance of the plaintiff's order by the home office. It appears by a clause contained in the order itself that all such orders were subject to the approval of the defendant. The evidence clearly shows that the defendant disapproved of the order, and notified the plaintiff of that fact. In the negotiations for a change of the order, plaintiff was told the reasons why defendant could not fill it. The clause in the order was a reasonable and proper one, and was made for the protection of the defendant. No approval from delay can be inferred, and the plaintiff, by his acceptance of the draft for \$25, in effect rescinded his order, and he was not entitled thereafter to maintain an action against the defendant for a failure to accept the same and comply with its terms.

For the foregoing reasons, the judgment of the district court is

REVERSED.

CITY OF GRAND ISLAND, APPELLEE, v. POSTAL TELEGRAPH
CABLE COMPANY, APPELLANT.

FILED NOVEMBER 1, 1912. No. 16,840.

1. **Licenses: OCCUPATION TAX: CITIES.** Under subdivision 9, sec. 48, art. III, ch. 13, Comp. St. 1911, each city of the first class having more than 5,000 and less than 25,000 inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said section.
2. ———: ———: **CONSTITUTIONALITY.** A city of the above class may lawfully enact an ordinance imposing on telegraph companies

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a license tax of a reasonable sum per annum for the privilege of transacting the business of telegraphy within the city, and, where such ordinance imposes a tax equal in amount upon all such telegraph companies, it is not obnoxious to the rule of uniformity and equality under sections 1, 6, art. IX, of the constitution.

3. ———: ———: ———. The amount of an occupation tax is not to be measured by the profits of the business taxed, but should be considered as one incident to local self-government, and when thus considered it appears *prima facie* reasonable in amount, courts of justice should not declare the ordinance void, unless and until it is clearly shown by competent evidence that the license charge is in fact unreasonable or confiscatory.

APPEAL from the district court for Hall county: JAMES R. HANNA, JUDGE. *Affirmed.*

O. A. Abbott and W. W. Cook, for appellant.

Arthur C. Mayer and W. A. Prince, *contra.*

BARNES, J.

This action was commenced by the plaintiff, the city of Grand Island, against the defendant, the Postal Telegraph Cable Company, to recover an annual occupation tax for the years 1904, 1905, 1906, 1907, 1908 and 1909, amounting to \$240, with interest thereon, which was alleged to be due the plaintiff under an ordinance of that city by which it was provided: "That there is hereby levied an occupation tax upon each and every occupation and business carried on within the limits of this city, in this section hereinafter enumerated, to raise revenue thereby in the several different sums on the several different occupations hereinafter specified, and that each and every person or persons, firm, association or corporation carrying on the occupation or business herein mentioned within the limits of the city of Grand Island, shall pay into the city treasury annually the sum named as hereinafter provided as a tax upon said occupation, and for the purpose of raising revenue thereby."

It was further provided by section 3 of the ordinance as follows: "Under the provisions of this ordinance and the authority vested in the city council aforesaid, there is levied upon each and every person or persons, firm, association or corporation carrying on business in the city of Grand Island, Nebraska, an occupation tax as follows, to wit:

"Article 1. The sum of forty dollars per year on the business and occupation of receiving messages in this city from persons in the city and transmitting the same by telegraph from this city to persons and places within this state, and receiving in this city messages by telegraph transmitted within this state from persons and places within this state to persons in this city, and delivering the same to persons in this city, except the receipt, transmission and delivery of any such message to any firm, department or agency or agent of the United States, and the receipt, transmission and delivery of any such which are interstate commerce. The business and occupation of receiving, transmitting and delivery of messages herein excepted are not to be taxed hereby."

The ordinance further provides: "Whenever the treasurer shall deem himself unable to collect any tax by this ordinance levied after the same is due and payable, he shall so report to the city attorney, and the city attorney shall therein bring an action in the name of the city in any court or before any justice of the peace, having jurisdiction, to the amount of the sum sought to be recovered by said action; the remedies hereby prescribed are not exclusive, but cumulative, and may be prosecuted at the same time."

Upon the trial in the district court for Hall county, without the intervention of a jury, there was a finding and judgment for the plaintiff for the sum of \$245, and costs of suit, and from that judgment the defendant has appealed.

The defendant has assigned and argued three grounds in support of its contention that the judgment of the dis-

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strict court should be reversed: First, the tax demanded is unreasonable and confiscatory; second, the tax violates the rule of uniformity and equality under sections 1 and 6 of article IX of the state constitution; third, the occupation tax in question trenches upon the commerce clause of the constitution and laws of the United States.

We are of opinion that the second and third assignments of error are fully answered by *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692. It seems to be conceded that the occupation tax ordinance in that case and the one in the case at bar are practically the same in form and substance. After citing the principal leading cases upon those questions and discussing the effect thereof, it was there held: "Under section 52, ch. 14, art. II, Comp. St. 1891, each city of the second class having more than 5,000 inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said action." It was further held: "Where a telegraph company is engaged in both interstate and intrastate business, an ordinance levying an occupation tax on that portion of such business which is carried on wholly within the state is not repugnant to section 8, art. I of the constitution of the United States, since it in no way interferes with, or regulates, interstate commerce;" and that "an occupation tax may be collected by ordinary suit, where the ordinance imposing the tax so provides." On a rehearing of that case (43 Neb. 499) the opinion was adhered to by consideration, and on the strength of *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, where it was said: "A city ordinance, made under power conferred by a state statute, imposing a license of five hundred dollars upon a telegraph company, which had accepted the provisions of the act of July 24, 1866, c. 230, 14 Stat. 221, upon business done exclusively within the city and not including any business done to or from points without the state, and not including any business done for the govern-

ment of the United States, its officers or agents, is an exercise of the police power, and is not an interference with interstate commerce." It follows that defendant's last two assignments of error cannot be sustained.

In considering the first assignment, that the tax in question is unreasonable and confiscatory, we find from the record that defendant maintains an office in the city of Grand Island, where it conducts a large amount of interstate business and considerable intrastate business, but neglects and refuses to pay the occupation tax; that defendant's receipts for intrastate business for the years in question herein were \$1,333.17, and that the total tax sought to be collected for those years under the terms of the ordinance was \$240. It further appears that, by a system of accounting or bookkeeping adopted by the defendant, it was attempted to be shown that for some of the years in question the expense of conducting the intrastate business reduced the gross receipts to a trifle less than enough to pay the tax of those years. It was not shown, however, that the method of apportioning the expenses of defendant's entire business was the correct method, or that such apportionment was either just or equitable, and therefore we conclude that the evidence was insufficient to warrant a court of justice in finding arbitrarily that the tax was either unreasonable or confiscatory. The city clearly had the power to tax the business in question. The tax was uniform, in that it operated alike on all persons or corporations engaged in that business, and we are not aware of any case which holds that when the business transacted by one person or corporation of a class has proved largely remunerative, and the business of another of the same class was less remunerative, or was in fact conducted at a loss, a court of justice can for that reason declare an occupation tax ordinance void. We think no court should say as a matter of law that an occupation tax of \$40 a year upon each and every telegraph company doing business within the limits of the city of Grand Island is manifestly unreasonable and confiscatory. It

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may be said that the charge is *prima facie* reasonable. *Western Union Telegraph Co. v. Borough of New Hope*, 187 U. S. 419. The amount of an occupation tax is not to be measured by the profits of the business, but should be considered as one incident to local self-government—to supervision, to the expense incident to the issuing of the license, to the probable expense of inspection, regulation and such police surveillance as the municipal authorities can lawfully give to the location, erection and maintenance of poles and wires as provided by ordinance. In the absence of evidence which clearly shows that the license charge, in general effect, is such as to make it confiscatory, the ordinance must be upheld.

It follows that none of the defendant's contentions can be sustained, and the judgment of the district court is

AFFIRMED.

**EDWARD OWEN ET AL., APPELLEES, V. D. C. MAIN ET AL.,
APPELLANTS.**

FILED NOVEMBER 1, 1912. No. 17,029.

1. **Statutes: CONSTRUCTION.** Where the language of a statute is clear and unambiguous, it must be interpreted in its ordinary sense, even though it lead to an injustice; but, if the language is doubtful or obscure, and it is susceptible of an interpretation which will cause a forfeiture or perpetrate an injustice, while another interpretation will avoid such a result, that which is in furtherance of justice will prevail.
2. **Agricultural Societies: COUNTY AID: TITLE TO PROPERTY.** A statute authorized county boards in counties where county agricultural societies have purchased or shall purchase real estate for fair grounds to pay out of the county treasury the same amount of money for the purchase and improvement of such sites as paid by such agricultural societies or individuals, and provided, further, that when such agricultural societies should "be dissolved or cease to exist in any county where payments have been made for real estate or improvements upon such real estate, for the

use of any agricultural society, then all such real estate and improvements shall vest in fee simple to the county making such payment." The latter provision is construed; and it is held that the words "all such real estate and improvements" refer only to the real estate purchased and improvements made by the money paid out of the county treasury.

3. ———: ———: DEFAULT: RECOVERY BY COUNTY. The amendment of section 14 made by the laws of 1879, p. 400, providing that a county board may pay to a county agricultural society owning a certain quantity of real estate for fair grounds a specified amount of money "to be expended by such society in fitting up such fair grounds, but for no other purpose," made no change with respect to the right of the county to recover back the amount of its contribution in case the society defaulted as specified in the statute.
4. ———: ———. The purpose of the legislature was to allow such a society formed to aid in the extension of agricultural education the use of the funds of the county to a limited extent, in trust, and to prevent the diversion of public funds to private use if the society fails to carry out the purpose of its organization.

APPEAL from the district court for Wayne county:
GUY T. GRAVES, JUDGE. *Reversed with directions.*

James Britton, William V. Allen and William L. Dowling, for appellants.

A. R. Davis and R. E. Evans, contra.

LETTON, J.

In 1885 the Wayne County Agricultural Society was incorporated under the procedure provided for in the general incorporation laws of the state. Stock was issued and subscribed for by the incorporators. Prior to the holding of the first annual fair, which was held in September of that year, it purchased 25 acres of land, and fitted up the same for fair purposes by preparing a race track, and building fences, grand stands, and other structures necessary for the carrying on of the purposes of its organization. It realized from stock subscriptions the sum of \$1,641, of which \$922 was expended in the purchase of land for the fair grounds.

In September, 1885, the association applied to the board of county commissioners of Wayne county for an appropriation of money to aid the society in fitting up its grounds. A bill was presented for \$300, which was allowed, and on January 4, 1886, a warrant upon the general fund for that amount was paid by the county. The evidence shows that by the middle of January, 1886, \$1,806.25 had been paid for real estate and improvements thereon, apparently from the proceeds of the sale of stock and from the appropriations made by the county. The land had been bought and paid for before any money was received from the county. Premiums and other expenses were paid from other sources. For a number of years between 1885 and 1889 the society held fairs, and received aid from the county board under the provisions of section 12, ch. 2, Comp. St. 1881, upon filing the necessary certificate under the act. It held its last fair in September, 1901. On April 25, 1905, the society was dissolved by legal proceedings, and the defendants Main, Bressler, and French appointed trustees for the creditors and stockholders. This action was brought on behalf of the county against the trustees and certain persons claiming under them. Its purpose was, as the prayer shows, to procure a decree "that the aforesaid real estate acquired by said Wayne County Agricultural Society and used for its fair grounds and all improvements by it made thereon has vested in fee simple in said county of Wayne; that the defendants and each of them have no right or title or interest in said real estate; that the title of the said county of Wayne to the said real estate be quieted against the claims of the defendants; that the said plaintiffs be put in possession of said real estate; and for such other and further relief as may be just and equitable."

A number of defenses are pleaded: The statute of limitations; that the real estate is private property of the corporation and of the individual stockholders; that the provisions of the statute upon which the plaintiffs rely is violative of the provisions of the constitution of the state

of Nebraska and of the federal constitution and of the fifth and fourteenth amendments thereto; and a denial that any part of the money appropriated was expended in the purchase or improvement of the real estate. The reply practically amounts to a general denial of the new matter in the answer, coupled with a demurrer to the same.

The arguments have taken a wide range, but we think it unnecessary to consider them at length. The plaintiffs' theory, summarily stated, is that the society is a public or quasi-public corporation, formed to carry on a public enterprise, and authorized under the statute to receive aid from the county; that it, quoting from the brief, "acting under the statute, presented its application for public funds to improve the property already dedicated to the public, and, by virtue of such application and the payment by the county from the public funds of the sum applied for, the county is authorized and charged to hold the land in trust for the inhabitants of the county for county fair purposes. It has by the act of contribution been vested with the right and duty to become an actor in the preservation of the public land dedicated to the purposes prescribed by the articles of incorporation. By the incorporation and purchase of the land, there was a dedication to the public of Wayne county. By the application for and receipt of funds to improve or fit up the grounds, there was a contract that the county should assume the duty of keeping the land for the purpose to which it was dedicated." On the other hand, the defendants insist that the society is a private corporation carrying on a work for the benefit of the public, but having the right to own as its private property the real estate and other property necessary for its proper purposes which had been donated to it or was purchased by its private funds; that, as to such property, there was no dedication to the public, and that the provisions as to title vesting in the county on dissolution only apply to property for which payment has been made by the county.

Quite a little testimony was taken as to the payment of money by the county in successive years under the provisions of the statute allowing a sum equal to three cents for each inhabitant of the county to be paid to any agricultural society which has raised and paid in by voluntary subscription, or by fees imposed upon its members, in each year not less than \$50; but, since the condition expressed in the statute with reference to the real estate and improvements vesting in fee simple in the county applies only "where payments shall have been made for real estate or improvements upon such real estate," we think none of this evidence has any direct bearing upon the question at issue, except as it tends to show the quasi-public character of the corporation.

The decision of this case depends solely upon the interpretation of a statute. In order to ascertain the meaning of the legislature, a survey of the evolution of the particular provisions involved is needful. The first act in Nebraska relating to county agricultural societies was passed by the territorial legislature in 1858. 1 Complete Session Laws, p. 530. After providing for the organization of county societies and a territorial board of agriculture, and specifying the respective duties of these organizations, section 8 declared: "That all county agricultural societies which may be organized under this act be and the same are hereby declared bodies corporate and politic, and as such shall be capable of suing and being sued, and capable of holding in fee simple such real estate as they may purchase or receive by donation, not to exceed eighty acres of land and the buildings thereon." Section 9 provides, in substance, that conveyances made to such societies shall vest a title in fee simple. Sections 10 and 11 are as follows:

"Section 10. In all cases when such county agricultural societies shall purchase real estate as sites whereon to hold fairs, the county commissioners of such counties may, if they think it for the interest of the counties and societies, pay out of the county treasuries of such counties

the same amount of money for the purchase and improvements of such sites as shall have been, or shall hereafter be, paid by said agricultural societies or individuals for such purpose.

"Section 11. In all cases when agricultural societies shall be dissolved or cease to exist in any county where payments have been made for real estate or improvements upon such real estate, for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple to the county making such payment."

Though the law was amended in other particulars, these provisions seem to have been carried forward with the language unaltered until 1879, when these sections were changed to read as follows (Laws 1879, p. 400, secs. 13, 14, 15):

"Section 13. Each county society may purchase and hold in fee simple such real estate as they may deem necessary, not exceeding 160 acres of land, for the purpose of holding county fairs.

"Section 14. Whenever any county agricultural society, organized by law, shall have procured in fee simple, free from incumbrance, land for fair grounds not less than ten acres in extent, the county board of said county may, in their discretion, if the finances of the county will admit, appropriate and pay to such society a sum not exceeding one hundred dollars for every thousand inhabitants in said county, to be expended by such society in fitting up such fair grounds, but for no other purpose; but not more than one thousand dollars shall in the aggregate be appropriated in any one county.

"Section 15. Each society receiving such appropriation shall, through its secretary, make to the county board a detailed statement, with vouchers showing the legal disbursement of all the moneys received. And in all cases, when such county agricultural societies shall be dissolved, or neglect, for the space of two years, to discharge the duties devolving upon them by law, or cease to exist, in any county where payments have been made for real

estate, or improvements upon such real estate, for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple in the county making such payment, and the district court of said county, upon proof thereof, shall, upon petition of said county board, make a proper decree vesting the title to such property in said county."

No further amendment was made until 1905, but we think the changes then made were immaterial as affecting the questions here presented. Sections 8 to 11, inclusive, of the Nebraska act of 1858 are almost a verbatim copy of an act of the Ohio legislature, passed February 15, 1853. 1 Rev. St. (Ohio) S. & C., ch. 2, p. 66 *et seq.* Several other states have statutes of a similar nature conferring the power upon public authorities to appropriate money in aid of such societies. Some of these statutes make no provision for the return of the money or the reversion of the property for which it was expended if the society dissolves or fails to carry out the purpose of its organization; while others provide for the retention of an interest in the grant to the extent that it shall revert in case of such a failure. Among the latter class are the Ohio statute referred to; Laws Washington, 1909, ch. 62; Laws Maryland, 1904, ch. 141; Supp. to Code of Iowa, 1907, sec. 1660; Gen. St. Kansas, 1868, ch. 2. By the Kansas act the county commissioners, if the voters so authorize, may appropriate money to be expended under the direction of the county agricultural society in the purchase and improvement of fair grounds for the use of the society, and the statute provides that all such property shall be held in trust by the board of county commissioners for the use and benefit of the society.

The Iowa law permits the county authorities to appropriate and pay a sum in proportion to population to such societies, "to be expended by it in fitting up or purchasing such fair grounds, but for no other purpose," and, if authorized by a vote of the people, to purchase real estate for fair purposes. "The title of such real estate when

purchased to be taken in the name of the county," and placed under the control and management of an incorporated county society.

Coming now to a consideration of the Nebraska act: It will be seen that section 10 of the original act did not in terms authorize the county commissioners to pay any money to county agricultural societies, but it authorizes the board, "if they think it for the interest of the counties and societies," to "pay out of the county treasuries * * * the same amount of money for the purchase and improvements of such sites as shall have been, or shall hereafter be, paid by said agricultural societies or individuals for such purpose;" and that by section 11 it is provided that when such societies "shall be dissolved or cease to exist in any county where payments have been made for real estate or improvements upon such real estate, for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple to the county making such payment." There is no direction to whom the money should be paid or as to how the title should be taken. It might be paid by the county to the landowner and the title taken to the society, or the title might be taken to the county, as trustee, "for the use of the society," as the statute says. The money might be paid through the society and the title taken in either way equally as well.

It is a principle of statutory interpretation that, where the language of a statute is clear and unambiguous, it must be interpreted in its ordinary sense, even though it lead to mischief and injustice; but it is also a principle that, if the language of a statute is doubtful or obscure, and it is susceptible of an unreasonable interpretation, or one which will lead to a forfeiture or to an injustice, while another interpretation will avoid such a result, that which leads to a reasonable and just result will prevail. Beal, *Cardinal Rules of Legal Interpretation* (2d ed.) p. 324; 2 *Sutherland (Lewis) Statutory Construction* (2d ed.) secs. 408, 490, 541.

It seems to the writer impossible to believe the legislature

intended that, where public spirited citizens had engaged in a voluntary enterprise for the public benefit and in aid of agriculture, the county might, by contributing perhaps a small amount in proportion to the whole amount invested, on the expiration of the corporate charter, or on the cessation of the undertaking for any other cause, not only reclaim the amount of its own contribution, but take by the strong hand that which had been invested by others. Such a construction should not be adopted, even if constitutional, unless no other reasonable meaning can be imputed to the statute.

The language of section 11 is that "such real estate and improvements" shall vest in the county. What real estate and improvements does this refer to? Plainly that for which payments had been made by the county for the use of the society. If the county has taken the title in its own name for the use of the society, when the society dissolves or ceases to exist the trust relation ends; and under the statute the title to the real estate and improvements vests in the county in fee simple, without further proceedings. The result would be the same if the county had purchased through the society and the title had been taken in the name of the society. The use of the property and its control would be in the society, which would hold the legal title in trust for the county, and upon the specified contingency of the society dissolving or ceasing to exist title to such property would vest in the county. The intent that runs through this class of statutes seems to be to preserve that property for the public the use of which it has given to the society, and in this way to prevent the diversion of public funds, either directly or indirectly, to private purposes.

These considerations apply to the statute as it stood before the amendment of 1879. The amendment to section 14, then made, changed the law in the respect that it provided that money might be appropriated and paid to the society only, and to no other person; not, as before, for the purchase of real estate or improvements, but for "fitting

up such fair grounds, but for no other purpose." Section 15, however, was unaffected in so far as it provided that on the happening of the specified contingency, "where payments have been made for real estate or improvements * * * for the use of any agricultural society, then all such real estate and improvements shall vest in fee simple in the county making such payment." Of course, it was necessary to retain these provisions in order to preserve the right of recaption by counties having money invested in fair grounds. The new restrictions in section 14 cannot apply to any such counties.

It is argued that the rapid depreciation in value of improvements of a certain class, and the difficulty of separating other improvements, of the nature of trees, fences, roads, race-tracks, etc., from the real estate, in case of a necessity arising, should prevent such a construction of the statute. It is true that conditions may arise which render the statute difficult of application; but, if the evident purpose of the legislature to preserve for the public the money which had been converted into real estate or improvements is kept in mind, we believe the powers of a court of equity are sufficient to properly guard public interest. On the other hand, if the construction contended for by the county is adopted, it will be possible that a county, by making a contribution of a few dollars for improvements on valuable real estate belonging to an association of this class, on its failure to hold a fair through unavoidable circumstances, or upon the dissolution of its charter either by lapse of time or from other causes, may sequester such property without compensation. Such a consequence shocks the conscience.

To conclude, it seems to us that the intention of the legislature was to preserve the public funds, while at the same time aiding in the extension of agricultural education. We will not lightly impute to that body an intention to take something for nothing from the progressive citizen who, in common with the county, advanced funds for the general welfare.

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The improvements made with the county money are not distinguishable and severable from those made by the society from its own funds. The defendants offered in open court to pay the sum advanced with legal interest. That the public should receive back its own if the enterprise fails is just and right, and we think this is all that the county can justly claim.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment in behalf of plaintiff for \$300, with interest from the date of payment at 7 per cent. per annum, and to deny the plaintiff's prayer for a decree quieting title to the real estate involved.

REVERSED.

ROSE, J., dissenting.

The Wayne County Agricultural Society was a creature of statute. It came into existence for a definite purpose. It was not a money-making corporation. It was above the aim of pecuniary individual enterprise. Its field of influence was in a farming community. Its object was the promotion of agriculture, stock-raising, horticulture, and the mechanical arts. Its principal duties were necessarily of a public nature, and it was properly the object of public solicitude. The legislature provided for its organization and maintenance. Its technical status is immaterial, since in any view it was in some aspect an agency of government. The county was authorized to appropriate public money for its benefit. Grounds and improvements for holding annual fairs were purchased by joint contributions of private individuals and the public. Some of the expenses of holding fairs were derived from the same source. There was no reason why public-spirited citizens who were interested in the improvement of a farming community should not be allowed to make voluntary contributions for that purpose upon terms prescribed by statute. Every item so contributed was, under the statute, voluntary. In making them, each

contributor entered into a contract with the public to participate in a public agency, and the statutes were by construction parts of the agreements so made. The statute was an open book. Every contributor knew the terms prescribed by law and agreed to them. He knew before generosity prompted him to join in the creation of a public fund that the property purchased with it would be held in trust for the county, after abandonment of its use for the purposes of a fair. The statute said so, and that provision remained in force during the entire existence of the society named. There is no question of forfeiture or confiscation in the case. The Wayne County Agricultural Society held fairs from 1885 until 1901. Later it abandoned the purposes of its existence and was dissolved. The trust property, consisting of the fair grounds and improvements, became valuable. What shall be done with it? That was the question to be considered.

It seems clear to my mind that the question is answered in unequivocal terms by the statute, which is by construction embodied in all the contracts between the public and those who voluntarily created the fund with which the real estate in controversy was purchased and improved. "In all cases, when such county agricultural societies shall be dissolved, or neglect, for the space of two years, to discharge the duties devolving upon them by law, or cease to exist," says the statute, "in any county where payments have been made for real estate, or improvements upon such real estate, for the use of any agricultural society, then *all such real estate and improvements shall vest in fee simple in the county making such payment*, and the district court of said county, upon proof thereof, shall, upon petition of said county board, make a proper decree vesting the title to such property in said county." In my opinion, this language is too plain for construction. It means, as applied to the facts of this case, that the "real estate and improvements" constituting the fair grounds is in equity the property of the county. If any ground for construction existed, however, the interpretation of the majority is

erroneous. The statute as a whole shows that the funds with which the fair grounds were purchased and improved were intended for a public purpose. The fund originally contributed by the county for improvements became, for the purposes of holding fairs, as much a part of the real estate as the land itself. When the society and those acting for it appealed to the county for aid, they proclaimed the public character of the undertaking. When the county contributed funds, it asserted the same fact. When the funds were received from the county, they were accepted as public funds. They could not be lawfully collected from taxpayers for a private purpose. The real estate being in fact public property held in trust for the county, it should be decreed to be the county's property upon the extinguishment of the trust by abandonment. The statute, as I read it, says so; but, conceding the language quoted to be ambiguous, all the legislation on the subject indicates an abiding purpose on the part of the lawmakers to keep public property used for agricultural purposes under the control of a public agency, and to transfer the title to the public after the original use terminates. The legislature so understood its own enactments, and that intention is shown by the amendment of 1905. Laws 1905, ch. 2.

A manifest purpose of the statute is the perpetuation of agricultural societies. The act should be construed with this end in view. Increase in the value of land used for fairs was inevitable. If the title is held in trust for the incorporators or stockholders of agricultural societies, there will be a temptation to abandon the fairs, sell the fair grounds, and distribute the profits among themselves. This would defeat the evident purposes of legislation. To prevent such a result and to continue the public agency established to promote the interests of agriculture, the legislature wisely made provision for decreeing the land to be the property of the county. It is apparent, therefore, that the construction of the majority defeats the legislative will.

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Even if the construction of the majority were correct, however, no sufficient reason can be given for allowing the county to recover the amount contributed by it, with interest, while the shareholders are allowed to distribute among themselves the profits on their contributions. In a suit in equity involving property rights, the same rules should be applied to all the parties, though one of them is a county. I do not approve the doctrine which gives the public what it contributed to a common fund, with statutory interest, and distributes the remainder with accruing profits, to individual contributors.

**ANDREW M. MORRISSEY, APPELLANT, v. ADDISON WAIT,
SECRETARY OF STATE, APPELLEE.**

FILED NOVEMBER 1, 1912. No. 17,839.

1. **Elections: NEW PARTIES: FORMATION.** Under the provisions of section 45, ch. 52, laws 1907, providing for the formation of new political parties, it is not essential that the 500 electors who must be present at a mass state convention to form a new party shall be the identical 500 electors who are required to sign an agreement to form such new party and support its nominees at the next election.
2. ———: **NOMINATIONS: NEW PARTIES.** Sections 39, 40, ch. 52, laws 1907, providing for the nomination of candidates by a convention or committee of a political party, apply to nominations by new parties for general elections, as well as to nominations made by previously organized parties to be filled at special elections, and for offices excepted from the provisions of the act.
3. ———: ———: ———: **FILING CERTIFICATE.** Where a new party is formed after the time fixed by the statutes for the holding of the regular primary elections, nominations for candidates of such party may be made by mass convention held under the provisions of section 45, ch. 52, laws 1907, and certificates of nomination of such candidates may be filed with the proper officer at the time specified in section 40 of the same act.
4. ———: ———: **STATUTES: CONSTRUCTION.** In construing statutes relating to the exercise of the elective franchise and to the nom-

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ination of candidates by political parties, either at primaries or by conventions or committees, the court should construe doubtful or ambiguous statutes in the light of the constitutional provision that "all elections shall be free; and there shall be no hindrance or impediment to the right of the qualified voter to exercise the elective franchise." Const., art. I, sec. 22.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Andrew M. Morrissey and Morning & Ledwith, for appellant.

Grant G. Martin, Attorney General, Jesse L. Root and C. C. Flansburg, contra.

LETTON, J.

This is an appeal from a judgment of the district court for Lancaster county sustaining the right of the candidates of the Progressive party to have their names printed on the official ballots for the general election in 1912. The facts seem to be as follows: A mass convention to form a new party was held in Lincoln on September 3, 1912. On the afternoon of that day the meeting was adjourned until evening, at which time Governor Johnson of California was advertised to speak. A large number of people gathered and were present at the evening meeting. The chairman of the meeting read the proposed Progressive party platform, which was adopted by a *viva voce* vote. After the address of Governor Johnson had been delivered and a number of persons had left the hall, the persons whose rights are in dispute in this case were nominated as candidates of the Progressive party. On September 13, 1912, there were filed in the office of the secretary of state five separate documents, each bearing the following heading: "We, the undersigned qualified electors of the state of Nebraska, in mass convention assembled, do hereby associate ourselves together, and agree to form a new political party, to be designated the 'Progressive' party, and we do

hereby agree to affiliate with said party, and to support its nominees at the next general election." These papers were bound together and filed with the secretary of state as one document. The total number of signatures thereon exceed 500 in number. There was also attached an affidavit by one Van Meter in substance stating that he is a qualified elector; that at the mass convention, at which the Progressive party was organized as a new party, he had charge of and witnessed the signatures, and saw the electors sign the same and agree to support its nominees at the next general election, and that he verily believes them all to be qualified electors of the state. On the same day a certificate of nomination and oath in proper form were filed in the office of the secretary of state, signed by Arthur G. Wray, as chairman, and John C. Sprecher, as secretary of the convention. Within three days after the filing of this certificate of nomination, the plaintiff, who is a candidate for the office of attorney general on the ticket of the Democratic party, filed written objections challenging the legality of the formation of the new party and the validity of the certificate of nomination. The secretary of state fixed a time and place for a hearing, and notified the several candidates. At the hearing evidence was taken, and the objections were overruled. A bill of exceptions was prepared and an appeal taken to the district court for Lancaster county, which affirmed and sustained the action of the secretary of state.

At the hearing before the secretary of state, it was contended that the Progressive party was not legally organized, because the 500 persons who signed the agreement to form a new party were not identified as being members of the mass convention, but this contention was virtually waived at the argument before this court. There is no definite proof that 500 electors were not present at the convention. The evidence is conflicting on this point, but seems to preponderate in favor of the decision of the secretary of state. Furthermore, there is no requirement

in the statute that the 500 electors who sign the agreement must be the identical persons who were present at the convention. Appellant concedes that the primary law of 1907 is in force, except as modified by chapter 46, laws 1911, but argues that the Progressive party is not entitled to a place upon the ballot at the 1912 election, for the reason that section 45, ch. 52, laws 1907, provides: "Such new party shall be entitled to have a separate party ballot at the next primary election held thereafter." He says in this connection that "the legislature did not intend that such new party shall be entitled to a party ticket at the next *general* election," but that it would be entitled to a party ticket "*at the first primary held thereafter,*" and that, if the party was not organized in time to get its ticket in the field by means of a primary election before the general election, it must wait until the next primary, so that it may get its ticket in the field through the regular channel. This view would bar these candidates from the 1912 election.

The provision for the organization of new parties is contained in section 45, ch. 52, laws 1907 (Ann. St. 1911, sec. 5905, Comp. St. 1911, ch. 26, sec. 118s), which is a part of the law relating to primary elections. The section is lengthy and will not be copied here in full. It contains the requirements hereinbefore referred to that there shall be 500 electors present at a mass state convention, and the same number of signers to an agreement to form a new party. It also contains the foregoing quotation that "such new party shall be entitled to have a separate party ballot at the next primary," etc. This section, when considered with the requirement of the statute that all nominations be made by primary elections, might justify the thought that mass conventions can only form a new political organization, and that its candidates must be named at the next primary; but a view of other sections of the statute leads to a different conclusion. Section 39 of the same act provides: "All nominations for candidates of any political party for office to be filled at

a special election or any other office to be filled by the electors, excepted from the provisions of this act, shall be nominated by a convention or committee of their political party," etc.; and provides, further: "It is the intention that the manner provided in this section for the nomination of officers named herein, by a convention or committee, shall apply only where such officers are to be chosen at a special election," etc. Section 40, in substance, provides that, when nominations are made by a convention or committee as provided for in section 39, the certificates of nomination to be filed with the secretary of state shall be filed not less than 25 days before the election; but it provides, further: "*Certificates of nomination for a new party* may be filed with the secretary of state or the county or municipal clerk twenty-five or twenty or fifteen days before the election, as the case may require."

Construing the several sections of the statute together, it seems clear that the "certificate of nomination for a new party" mentioned in section 40 applies to the necessary certificate when a nomination is made by convention, and cannot possibly apply to a nomination made by a primary election, as shown by the returns thereof, in which latter case no nominating certificate is required. The limit within which such nominating certificate may be filed with the secretary of state is much later in point of time than that fixed for canvassing the returns and for the certification to the secretary of state of the results of a primary election. It seems clear, therefore, that a new party may be formed after the time when it is possible for it to participate in the regular primary election. It is proper to say that it is the duty of the courts, in construing statutes providing for printing the names of candidates of both old and new political organizations upon the ballot, to do so in the light of the constitutional requirement that "all elections shall be free; and there shall be no hindrance or impediment to the right of the qualified voter to exercise the elective franchise." Const.,

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art. I, sec. 22. The legislature may regulate the manner of nomination of candidates whose names shall be printed at public expense upon the official ballot. It may, and patently does, recognize the existence of political parties, and the formation of new parties in this connection. Its regulations in this respect are within its powers, provided that they are reasonable and do not unnecessarily hamper or impede the right of a voter to vote for whomsoever he pleases at the general election.

We are of opinion that, under the plain provisions of the sections of the statute referred to, the candidates of the Progressive party are entitled to a place upon the official ballot. The opinion of the secretary of state and the judgment of the district court are

AFFIRMED.

HAMER, J., concurring.

On the 28th day of September, 1912, the appellant, Andrew M. Morrissey, filed his petition in the district court for Lancaster county alleging that he was a qualified elector of Nebraska, eligible to the office of attorney general, and nominated at the primary election, April 19, 1912, as the democratic candidate for said office, and that he received his certificate of nomination and is entitled to have his name printed on the official ballot; that the defendant, Addison Wait, is the secretary of state, and that it is his duty as secretary to certify to the several county clerks the nominations of all candidates named by the political parties, in order that the names may be printed on the official ballot to be used at the November election; that at the time he was nominated there was no political party in Nebraska known as the Progressive party; that on September 13, 1912, there were filed in the office of the secretary of state certain documents, reading: "Agreement to Form New Party. We, the undersigned qualified electors of the state of Nebraska, in mass convention assembled, do hereby associate ourselves together, and agree to form a new political party, to be

designated the 'Progressive' party, and we do hereby agree to affiliate with said party, and to support its nominees at the next general election;" that there was appended to the said documents the affidavit of G. O. Van Meter, setting forth "that he is a qualified elector of this state, and that at the mass convention held in the city of Lincoln on September 3, 1912, at which the Progressive party was formed and organized as a new party, he had charge of and witnessed the signatures, and saw the electors preceding sign the agreement to form said new party and to support its nominees at the next general election, and that he verily believes them all to be qualified electors in the state;" that on said 13th day of September, at the time of filing the said alleged agreements, there was also filed in the office of the secretary of state a document purporting to be a certificate of nomination for the several state offices involved and for presidential electors and for United States senator, and designating said several candidates. The certificate of nomination certifies that at a mass convention held in the city of Lincoln, September 3, 1912, a new party was then and there organized under the name of the "Progressive Party," and that not less than 500 electors participated in the convention. It was further alleged that there was a less number than 500, and that they were composed of persons of both sexes.

It is objected by Mr. Morrissey that there is no legal authority to hold political conventions to nominate candidates for any of said offices, and that the laws of the state prohibit the making of nominations for said offices by political conventions; that said pretended convention did not represent a political party casting 1 per cent. of the votes at the last general election; that the purpose of holding said convention was to disorganize existing political parties, and to impair the value of the several nominations given to candidates for said several offices. It was further objected that the names of said candidates so claimed to be nominated should not be certified to the county clerks of the several counties as candidates of said

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Progressive party, and he objected to any certificate being made by the secretary of state; that, upon the filing of said objections, the secretary of state fixed a time for the hearing at 2 o'clock in the afternoon of September 18, 1912, and at said time and place the objector appeared in person and by attorneys, and said candidates also appeared by attorneys, and evidence was introduced, and the matter was argued to the secretary of state, who thereupon entered an order overruling said objections, and filed a written opinion assigning his reasons therefor; that on the 2d day of October said cause was presented for review before the Honorable P. James Cosgrave, one of the judges of the district court for Lancaster county, who, after argument, entered an order sustaining the action of the secretary of state and denying the relief prayed for in the petition; that it was found upon the stipulation and agreement between the parties that the Progressive party was duly organized and its nominees duly nominated and legally certified to the secretary of state, and that they are entitled to a place on the official ballot as the candidates of the Progressive party. It was therefore ordered, considered and adjudged that the said order of the secretary of state be in all things confirmed and approved, and that the proceedings of the said objector, Andrew M. Morrissey, be dismissed.

The case comes to this court to review the judgment rendered in the district court. It is contended that the judgment of the district court should have been in favor of said Morrissey and against the defendant, Wait, and that an order should have been entered enjoining the secretary of state from certifying the names of said candidates to the several county clerks to be placed upon the official ballot.

It appears from an examination of the record that there was a mass convention held in Lincoln at the city Auditorium, September 3, 1912, and that more than 500 electors were in attendance and participating. It is contended that in the afternoon there were less than 250

voters present in the auditorium, but it further appears that later in the evening there was an immense audience. It is alleged that the electors came for the purpose of hearing Governor Johnson of California deliver a speech. It must be admitted that, if a large number of electors were there, they may have been there for the purpose of participating in the convention, as also for the purpose of hearing the speech. It being admitted that a large audience had assembled, it is impossible to say for what particular purpose they were there. It is contended that the papers signed were in five separate parts, although they all read, in substance, the same way. It would not be expected that 578 names would all be placed on one long paper, when it would be much more convenient to put them on five papers. This objection is purely technical and without merit.

A consideration of the statute would seem to dispose of the questions presented. Section 118s, ch. 26, Comp. St. 1911, would seem to furnish statutory authority for organizing a new party in the state. It provides: "Electors may form a new party. * * * In order to form a new party there shall be present at a mass convention electors to the number of at least five hundred (500) in a state convention." Section 117f, ch. 26, Comp. St. 1911, provides: "The name of no candidate shall be printed upon an official primary ballot unless at least thirty (30) days prior to such primary" nomination papers be filed. It is provided by section 118n, ch. 26, Comp. St. 1911: "Certificates of nomination for a new party may be filed with the secretary of state or the county or municipal clerk twenty-five or twenty or fifteen days before the election, as the case may require." The foregoing section provides that this may be done in nominations that are made by convention or committee. The foregoing sections seem to dispose of the matter. It would seem not to be the intention of the primary act to abrogate the right of electors to form a new party; but apparently the thing contemplated is to perpetuate the right to form

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new parties. Whether it is essential that the particular 500 electors who must be present at a mass state convention to form a new party shall be the identical electors who are contemplated by the act as necessary to sign an agreement to form such new party may be debatable. Section 45, ch. 52, laws 1907, provides, among other things, that "in order to form a new party there shall be present at a mass convention electors to the number of at least five hundred (500) in a state convention," and electors to "at least the number specified shall sign an agreement to form such new party and support its nominees at the next election;" but the act does not say the same 500 at the convention shall sign the agreement. It would be a harsh construction of the act to say that the same 500 who attend the convention shall also sign the agreement.

There is a contention made that the purpose of forming the new party is not to bear immediate fruit, and that the new party is not to have recognition until after it has voted at a primary. This is not according to the American idea, and it would be eminently unjust. It would be directly in conflict with section 22 of the Nebraska bill of rights, which provides: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."

Secretary of State Wait acted upon the evidence brought before him. His conclusion seems to have been a proper one. It was sustained by the district court for Lancaster county. It would be unfair to many thousand electors of the state of Nebraska to prevent them from voting for the candidates of their choice.

**FANNIE CUSICK, APPELLEE, v. NATHAN BRODSKY ET AL.,
APPELLANTS.**

FILED NOVEMBER 1, 1912. No. 16,783.

Judgment: SUIT TO VACATE: EVIDENCE. Evidence examined and set out in the opinion, *held* sufficient to sustain the finding and decree of the district court.

**APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.***

J. E. von Dorn. for appellants.

J. J. O'Connor, contra.

FAWCETT, J.

Defendant Brodsky was a retail grocer in Omaha. Among his customers was one Charles W. Ellis, whose wife is a sister of plaintiff. The Ellis family traded with defendant for a number of years. As a result of such trading the Ellises finally became indebted to defendant in the sum of about \$140. Defendant appears to have sold out his business and placed his accounts in the hands of a collector. Suit was brought in justice court upon the Ellis account against plaintiff, and service of summons was made upon her. At the time set for hearing neither plaintiff nor defendant appeared at the justice court. Judgment was entered against plaintiff. Upon the judgment thus entered defendant subsequently had an execution issued, and was about to levy upon property of plaintiff, when she brought this suit to restrain proceedings under the execution, and to set aside the judgment upon the ground that she was in no manner indebted to defendant, and that after bringing the suit against her defendant told her that it was brought against her by mistake; that she need not pay any attention to the suit, as he would withdraw it; that she relied upon his statements, and for that

reason did not appear at the time set for trial; that she never knew that any further steps had been taken in the matter until defendant was about to enforce his judgment by the execution above referred to. There was a trial to the district court for Douglas county, which resulted in a finding in favor of plaintiff and a decree restraining the enforcement of the execution, vacating the judgment of the justice, and ordering that the parties appear before the said justice on March 14, 1910, or before some other justice if the case should be removed, for the purpose of trying the cause of action upon the account upon its merits. From this decree defendant Brodsky appeals.

The only reason assigned for asking a reversal of the decree of the district court is the statement in the brief of defendant that the judgment of the district court is not supported "by that preponderance of evidence necessary to sustain an injunction enjoining the enforcement of a judgment at law, where, as is disclosed in this case, the plaintiff had proper notice of the commencement of the suit in which the judgment, which the plaintiff herein seeks to enjoin, was rendered." After a careful reading of the entire bill of exceptions we are unable to agree with counsel. Plaintiff testifies unequivocally that when the summons in the justice suit was served upon her she called defendant, with whom she was well acquainted, by telephone, and asked him why he had sued her for this account; that he told her he had gone out of business, and the bills were all put in a bunch together; that "he didn't intend for that to go in. * * * He said he would call it off, and not to pay any more attention to it; he would go down and see this lawyer, and call it off." It is true defendant denies having made this statement, and says that what he told her was: "If the bill will be paid we wouldn't sue it. That is all I said." Mrs. Ellis testified that she went to see him about the suit, and asked him why he had brought suit against her sister; that he said: "O, Mrs. Ellis, I will call it off." The evidence does not show that this statement to Mrs. Ellis was communicated to plaintiff before the day

set for the trial. Defendant's argument is therefore sound that the statement by defendant to Mrs. Ellis, even if made, which defendant denies, would not afford any excuse for the failure of plaintiff to attend at the time of the trial. But there is one circumstance shown by defendant's own testimony which tends strongly to corroborate plaintiff that he had agreed to call the case off. While upon the stand as a witness in his own behalf, he testified that he did not attend the trial himself, and does not know who made proofs of the account. The record does not enlighten us upon that point beyond the statement by counsel for defendant upon the stand that he made proof. Just how he made it is not shown.

Upon the question as to whether or not plaintiff had any meritorious defense to the action if she had attended at the time of the trial, the evidence is not very satisfactory. There is no dispute but what the debt sued for was the debt of the Ellises. It is conceded that plaintiff never agreed in writing to be responsible for the debt, but defendant and his wife say that, when the account of the Ellises began to grow, they were not willing to continue increasing it, and that plaintiff then came to them and told them to let Mrs. Ellis have what she needed, and that she, plaintiff, would see that the goods were paid for. This, plaintiff unequivocally denies. Defendant places the time when this pledge was made by plaintiff as some two or three years prior to the hearing of this suit, yet he furnishes no evidence that plaintiff had ever paid him anything during all of that time on account of the Ellises, except one item of \$50, which plaintiff admits having made, but testifies that when she made it she told defendant that she was making the payment on account of her sister as a Christmas present. She denies ever having become security or ever having acknowledged that she was in any manner liable for the debts of the Ellises. Whether she did or not, however, is a question which can be determined when the law action is finally tried in justice court under the decree rendered by the district court in

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this case. Without pursuing the matter further, we think the evidence is sufficient to sustain the decree as entered by the district court.

AFFIRMED.

CHARLES G. HELMING ET AL., APPELLEES, v. EMIL O.
FORRESTER ET AL., APPELLANTS.

FILED NOVEMBER 1, 1912. No. 17,372.

1. **Ejectment: PARTIES.** Where parties entitled to the possession of land, in arranging for the commencement of an action to recover such possession, execute to their attorneys a quitclaim deed to an undivided half of such land under an agreement that such deed is to be held as security only for the services to be rendered by such attorneys in their behalf, such deed is in effect a mortgage, and does not render it necessary to join the grantees therein named as plaintiffs in such action.
2. **Appeal: LAW OF THE CASE.** "The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated." *Anheuser-Busch Brewing Ass'n v. Hier*, 61 Neb. 582.
3. **Trial: DIRECTING VERDICT.** In the trial of an action in ejectment, where the undisputed evidence clearly establishes the right of possession to be in one of the parties to such action, it is not error for the court to direct the verdict.
4. ———: **INSTRUCTION.** The instruction given by the trial court examined, and *held* to have properly submitted to the jury the only controverted question of fact in the case.

APPEAL from the district court for Dawson county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

E. A. Cook, for appellants.

Douglas Deremore, F. J. Mack, Edwin Vail and C. E. Spear, contra.

FAWCETT, J.

This case was advanced under our rules; it being its second appearance in this court. Our former opinion will be found reported in 87 Neb. 438. The facts are therein stated, and need not be repeated here. After the case was remanded, the petition was amended by adding the averment, "that said plaintiffs have a legal estate in and are entitled to the possession of said described premises, and said defendants since the 25th day of December, 1901, have unlawfully kept, and still unlawfully keep, the plaintiffs out of the possession of said premises." A jury was impaneled, and the trial proceeded upon the theory that it was an action in ejectment.

The interest of Minnie C. Helming and of her heirs, defendants herein, the void character of the decree of the county court, the right of the plaintiffs to prosecute the action for possession, and the defense of the statute of limitations are all disposed of by our former opinion, which is now the law of the case. The only questions presented here, which were not disposed of there, are: (1) The plea of a defect of parties plaintiff. (2) Did the district court err in declining to submit to the jury more than the single question as to the value of the rents and profits of the land in dispute for the years 1905 to 1908, inclusive?

The contention that there is a defect of parties plaintiff is based upon the fact that about two months prior to the commencement of the action the plaintiffs executed to their attorneys a quitclaim deed to an undivided one-half of the land in controversy. The uncontradicted evidence is that the deed was made and delivered as security only for the services to be rendered by counsel under their contract of employment. The deed was in effect a mortgage, and it was not necessary to join the grantees therein named as plaintiffs.

The evidence being undisputed that the only interest defendants have in the land is as the surviving husband

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and son of Minnie C. Helming, deceased, who was the surviving spouse of William F. Helming, deceased, in whom the title and ownership of the property was vested at the time of his death, and that the plaintiffs are the heirs at law of the said William F. Helming, the right of possession of the plaintiffs was so conclusively established that there was nothing upon that point to submit to the jury. In the trial of an action in ejectment, where the undisputed evidence clearly establishes the right of possession to be in one of the parties to such action, it is not error for the court to direct the verdict.

The judgment of the district court being in harmony with our former opinion, and being fully sustained by the evidence, it is

AFFIRMED.

HAMER, J., concurring in conclusion, and dissenting as to reasons given.

As stated in the main opinion, our former opinion is reported in 87 Neb. 438, and it would not be necessary to write this opinion if it were not for the fact, as the writer conceives, that material matter is left out of the main opinion. It is stated in the first opinion that William F. Helming died intestate December 5, 1889, without issue, leaving a widow, Minnie C. Helming; that his mother, Charlotte Helming, and his brothers, Charles G. Helming and Otto B. Helming, and his sister, Minnie Sill, were his only heirs; that his mother died soon thereafter, and that her interest descended to the brothers and the sister above mentioned, who were the plaintiffs in the action brought in the district court; that the widow made application to the county court under the provisions of chapter 57, laws 1889, known as the "Baker Decedent Law," to have the homestead assigned to her; that action was taken by said court setting aside and assigning to her the homestead of the deceased, consisting of 160 acres of land; that she afterwards married Emil O. Forrester, and thereafter died leaving the defendant, Paul Forrester, a

minor, as the sole issue of that marriage; that during coverture Minnie C. Helming Forrester and her husband executed a mortgage on the premises to one Leflang, which mortgage was afterwards assigned by said Leflang to said Emil O. Forrester; that the mortgage and assignment appear on the records of said Dawson county; that the said Minnie C. Helming Forrester and the defendants have held possession of the premises ever since the death of William F. Helming; that the plaintiffs brought their action alleging that they were the heirs of William F. Helming and the owners in fee of the premises, and that the proceedings by which the county court attempted to assign the title in fee to Mrs. Helming were void; that they prayed that the cloud upon the title created by the decree and the mortgage and assignment might be set aside for an accounting of the money paid by the defendants for the benefit of the estate, and for the rents and profits received, and for the possession of the premises; that the answer pleaded the decree of the county court, the passage of the curative act of April 9, 1895, the payment of certain mortgage indebtedness upon the land in reliance upon the title of Minnie C. Helming, and title by adverse possession ever since the entry of the decree in 1890, and defendants prayed that their title be quieted and for general equitable relief; that the reply alleged that the curative act was void, being in violation of the constitution of the state, and denied the other allegations in the answer; that upon the trial in the district court the court found that the defendants and Mrs. Helming had been in the adverse possession of the land since the 20th day of March, 1890; that since the date of the decree in the county court no right of plaintiffs in the real estate had been admitted or recognized by Mrs. Forrester or the defendants, and that the decree quieted the title in the defendants.

The material matter left out of the main opinion is that after the case was remanded by this court to the district court for Dawson county, and there was an amendment thereafter made to the petition by adding the averment,

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"that said plaintiffs have a legal estate in and are entitled to the possession of said described premises, and said defendants since the 25th day of December, 1901, have unlawfully kept * * * the plaintiffs out of the possession of said premises;" that the judgment rendered was upon this new state of facts, and therefore the further statement contained in the second paragraph of the syllabus of the present main opinion that "the decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and, for the purposes of the litigation, settles conclusively the points adjudicated," was wholly inapplicable. The old adjudication could not adjudicate a new set of facts. As the prayer to the first petition was set aside the cloud upon the title created by the decree and the mortgage and the assignment thereof, and for an accounting of the money paid by defendants for the benefit of the estate, and for the rents and profits received, and for which the plaintiffs would in equity be liable, and to enter a judgment in conformity with such findings, and the prayer of the defendants was that their title be quieted, and for general equitable relief, the case then made was one in equity to quiet title, and the amendment thereafter made was for "an execution for the delivery of the possession of said premises, and costs," and changed the nature of the case to a law action.

In the present case the defendants' answers were in effect general denials and a plea of defective parties plaintiff, and the case was tried before a jury, and proceeded apparently upon the theory that it was an action in ejectment, although it had formerly proceeded as an action to quiet title. The defendants requested an instruction submitting the ownership of the land to the jury, but the instruction was refused. The court submitted to the jury but one instruction, which was to find the value of the rents and profits of the land in dispute for the years 1905, 1906, 1907, 1908. There was a finding by the jury under the direction of the court that the

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plaintiffs were entitled to and should recover possession of the land, and there was also a finding that the plaintiffs should recover \$600 for rents and profits. There was a judgment on the verdict for the plaintiffs. It will be seen that the action was treated by the parties and by the court as one in ejectment. The judgment rendered is a judgment in ejectment. The main opinion is also inadvertently without a statement that the original case, upon which the former opinion of this court was founded, proceeded as an action to quiet title, while the second case after the amendment was made, and touching which the present opinion was rendered, proceeded as an action for the possession of real property.

It is contended by the defendants that it is not a question whether this court held the decree of the county court to be void, but did Mrs. Helming assert rights under the decree of the county court which were recognized by the district court, however erroneously, and of which facts the plaintiffs, or part of them, had notice at that time. It is contended by the defendants that the statute of limitations would begin to run from that time, and that, if Mrs. Helming asserted her rights by reason of the decree, her adverse possession would begin at that date, not because of the decree, but *because of the assertion of the right*. It is also contended by the defendants that the second fact which enters into their case is the transfer by the plaintiffs to two of their attorneys of one-half of the land in controversy by quitclaim deed, and before the suit was originally commenced. This seems to be the only contention of the defendants answered by the main opinion. Defendants also contend that the amended pleadings have so changed the issues from what they were at the first trial that the defendants are in no manner bound by the opinion of the court touching the former trial. They earnestly contend that title to the land is in the defendants by adverse possession.

It is contended by the defendants that the petition and answer necessary to a decree in the district court should

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have been admitted in evidence. They were offered by the defendants, and their admission was denied by the trial court. It is claimed that they were competent evidence because they showed an assertion of absolute title to the land in controversy by said Minnie C. Helming under the said decree. It is claimed that by the proceedings of the district court direct knowledge was brought home to the plaintiffs that Minnie C. Helming was not claiming simply a life estate in the land, but that she was claiming an *absolute title* in fee. It is contended by the defendants that, from the time Mrs. Helming filed her answer in the district court in the case brought by Charles G. Helming for an order to sell the real estate to pay debts, the plaintiffs knew that she was holding the land claiming to be the owner in fee, and that this was sufficient to support the running of the statute of limitations in her favor, except the one concerning the quitclaim deed to counsel Derremore and Mack. These contentions of the defendants do not seem to be answered in the main opinion. There is seemingly a mistake in suggesting that they were adjudicated in the former case, because, for the reasons stated, they would not have been adjudicated. Our court has held that the statute of limitations begins to run as to the right to quiet title as soon as an action might be brought for that purpose; that such action may be brought before the expiration of a life estate and as soon as the right accrues to the remainderman. It is perhaps confusing that there should be such a distinction between the time when the statute begins to run as to the right to quiet title and when it begins to run as to the right to acquire possession. Whether this should be may be debatable. It is clear that the rule laid down by this court provides a time when the statute begins to run as to the right to quiet title, and still a different time when it begins to run as to the right to recover possession, but in each case dependent upon the time when the right accrues. In the instant case it is the opinion of the majority of the court that the statute did not begin to run

as to the right to recover possession until Minnie C. Helming died, when her life estate was extinguished. It may be contended with a degree of plausibility and force that as soon as Minnie C. Helming claimed title as against Charles G. Helming, who was trying to sell the land as an administrator, and claimed that she was the owner of the property, and that she had acquired it by decree of the county court under the Baker decedent act, and that the district court had ratified her claim, that then, because of these things, the statute of limitations should begin to run.

It is claimed that the principle announced in *Hobson v. Huxtable*, 79 Neb. 334, and on rehearing, 79 Neb. 340, should determine this case. That case involved the consideration of a petition, pleadings and evidence, showing that one Annie E. Hobson died August 17, 1888, intestate, leaving her surviving husband, John H. Hobson, and her children, John J., aged 1 year, Roy J., aged 7 years, Ida Belle, aged 14 years, and George W., aged 18 years; that at the time of her death she was "seized" of a quarter section of land upon which she had resided with her husband and family for several years preceding her death; that the land did not exceed in value, over and above incumbrances, \$2,000, and constituted the family homestead, if occupying it as a family residence was a sufficient selection under the homestead law; that on October 27, 1888, one Palmer was appointed as administrator of the estate of the deceased, and in May filed his petition under the statute for license to sell lands to pay debts; that such license was granted by the district court, and the premises were sold October 24, 1890, to one Charles Huxtable, a defendant, and the sale was confirmed, and the administrator conveyed the premises to the purchaser, who went into possession under his deed, and that his wife remained in actual possession until the final judgment of the court; and the prayer of the petition was for a decree declaring the administrator's deed to be void. The defendants Ida Belle and George W. Hobson filed an answer

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admitting the allegations of the petition, the death of John H. Hobson, and asserting title in themselves, and asking that their rights be investigated, and that the defendants Huxtable be ejected from the premises. Against these defendants Hobson there was a plea of the statute of limitations by the defendants Huxtable. There was a decree in the district court quieting title in the four Hobsons, subject to the lien of a mortgage which had been paid by the money received from the purchaser at the administrator's sale. The Huxtables appealed. They contended that the use of the property as a family home was insufficient to show that the homestead was selected with the consent of the wife, and as to the defendants Ida Belle Hobson and George W. Hobson it was contended by the Huxtables that more than ten years had elapsed since they became of age, and that therefore they were barred by the statute of limitations. This court held that it would be presumed from the use of the property as a homestead that the wife consented to such use, and held that upon the death of the wife the homestead descended to the husband during his life, and upon his death in fee to the children, and that the license of the administrator was void, though the proceedings were regular. It was held that section 57, ch. 73, Comp. St. 1905, provides "that an action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate," while section 59 contains the further provision that "any person or persons having an interest, remainder, or reversion in real estate shall be entitled to all the rights and benefits of this act." It was contended by the attorney for the defendants Ida Belle Hobson and George W. Hobson that the claim set up in their answer was to be considered as an action in the nature of ejectment, and that such an action could not accrue to them

during the life of John H. Hobson, the life tenant. The defendants Huxtable contended that since the Huxtables did not claim under John H. Hobson, and could not claim to be the owners of his interest for life, an action by the heirs to obtain possession could have been as well maintained before as after his death. In the first opinion this court say: "We are, however, unable to regard this suit as an action in the nature of ejectment. The plaintiff's suit was to quiet title, and, if we admit this claim of the defendants Ida Belle and George W., we are committed to the anomalous proposition that two tenants in common can join in an action which shall be on the part of one *an action to quiet title*, and on the part of the other *an action in ejectment*." This court then further say in the first opinion that the two actions are incompatible, that they require different methods of trial and a different judgment at the end of the trial. In the first opinion, at considerable length, the court emphasizes the *impossibility* of joining two such diverse actions, but in the second opinion, delivered on the rehearing, this court said that if a remainderman, not being under disability, failed for ten years after his cause of action accrued to commence his suit, then he would be barred by the statute of limitations from maintaining his action to quiet title, and that, if the remainderman should be under a legal disability when the cause of action accrued, the statute would not commence to run against him until the disability was removed, and the court held: "The remainderman's estate in the homestead will not support an action in ejectment during the lifetime of the life tenant, and the statute of limitations will not commence to run against that possessory action until the demise of the surviving spouse." In the seventh paragraph of the syllabus in the second opinion this court announced the doctrine: "In an equitable action to set aside a deed, where the right of possession is in issue and depends upon principles of equity that must necessarily be determined by the court, it is the duty of the court to determine the right of possession,

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if all parties in interest are before the court, and put the parties entitled thereto into possession." Now, in that case it was not the petition which demanded possession. That seems to have demanded that a deed be declared void, but the defendants Ida Belle Hobson and George W. Hobson in their answer and cross-petition prayed the court to put them in possession. They were in court alleging facts which entitled them to bring ejectment, and they insisted that the court should render a judgment putting them in possession. By the first opinion in the case they were denied the claim which they made and which had been granted them in the district court, and a judgment of the district court was reversed as to them and their action dismissed; the court remarking: "It is a practical as well as a legal impossibility to join two such diverse actions." In the second opinion no such difficulty was encountered, and the opinion was unanimous. The writer of the former opinion concurred in the opinion upon the rehearing. In the latter opinion it was said that more than ten years intervened between the majority of the defendants Ida Belle and George W. Hobson on the one hand, and the commencement of the action on the other, and therefore that the statute of limitations barred the action of the said defendants Hobson to quiet their title to the real estate involved (*First Nat. Bank v. Pilger*, 78 Neb. 168; *Holmes v. Mason*, 80 Neb. 448), and therefore that the district court erred in quieting their title to the said real estate; but, as they were before the court demanding the possession of their part of the land, the only relief they were entitled to, and the court had the right to award that possession, it would do so (*Albin v. Parmelee*, 70 Neb. 746); that all the allegations in the petition were admitted in the answer and cross-petition; that the claim was made by the cross-petitioners that they were entitled to the immediate possession of the land, and that they were kept out of that possession by their co-defendants, the Huxtables, and asking judgment ejecting the Huxtables; that the allegations of the petition and

cross-petition were to be considered together, and that, so considering them, the defendants Huxtable were advised of the nature and extent of the claim made by the Hobson heirs, both plaintiffs and defendants; that the plaintiffs prayed for equitable relief and possession, and the defendant heirs for possession only, and that the court would read the petition and cross-petition together, and the allegations of the first pleading might be considered to aid the lack thereof in the other. *Railway Officials & Employees Accident Ass'n v. Drummond*, 56 Neb. 235. The former opinion in this court was vacated and also the decree of the district court, and a decree was entered in this court and in conformity with the opinion rendered upon the rehearing.

Minnie C. Helming died in December, 1901, and until that event an action in ejectment could not be maintained to recover possession of the premises because she had her life estate therein as the surviving spouse of William F. Helming. As the right of any plaintiff to maintain an action for the possession of said premises could not accrue until that time, the statute of limitations did not begin to run until that time was reached. The petition in this case was filed June 25, 1908, and the amendment thereto containing the allegation concerning the plaintiffs' alleged possessory right to the premises was made by leave of the court February 28, 1911. It will therefore be seen that the ten years required for a bar against the plaintiffs' action had not expired at the time of the amendment to the petition, and the action was therefore well within the time. Under the rule in *Hobson v. Huxtable*, *supra*, the cause of action for the possession of the property having been brought within ten years from the termination of the life estate, it was not barred.

But, in the opinion of the writer, it is not a question of whether Mrs. Minnie C. Helming had a good title by reason of the proceedings in the county court, and by reason of the proceedings in the district court in which Charles G. Helming was prevented from obtaining a

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license to sell the homestead for the payment of alleged debts against the estate. If Mrs. Helming asserted that she was the owner of the property and claimed the property by a title ever so inadequate, the statute of limitations ought to have begun running at that time, and in that event her heirs would be the owners of the property. It may be argued that, as her claim was based upon an insufficient and unauthorized proceeding, therefore everybody would take notice that she had nothing. But she did have *possession, and she was claiming the title*. As this court has construed the law in *Hobson v. Huxtable, supra*, no action for possession could be brought against Mrs. Helming as long as her life estate continued, and therefore no action could be brought for the possession of the premises. That is undoubtedly the law; but that is still not an answer to the question as to whether Mrs. Helming had no right to claim possession by reason of an inadequate and insufficient title, and, if she did exercise such a right, whether the statute would not then begin to run. There is danger that this court may have confused the existence of an actual legal right with the right of an unfounded claim of possession. Mrs. Helming forfeited nothing by reason of making her unfounded claim. The lawful claim of possession may originate in an unauthorized possession which cannot be legally defended. The running of the statute of limitations determines the right, and not the legality of the claim.

At the trial of the instant case, Charles G. Helming testified, as shown by the abstract, that "on January 4, 1908, myself, my brother and sister made a deed for an undivided one-half interest in this land to Douglas Dermore and Fred J. Mack. We made the deed as a guaranty for the attorneys' pay in this suit and a previous one. We executed and delivered the deed to them to secure the attorneys for their pay in this case; I will say in the previous case and all cases, all cases that might come up concerning this land." This testimony is not disputed in any way. It appears to be a fact that a quitclaim deed was

made to secure the attorneys their fee. This deed was made to secure the attorneys their fee in case they succeeded in winning the suit. Unless the defendants have in some way been misled to their prejudice by the quitclaim deed to Deremore and Mack, it is difficult to understand why they have any legal or moral right to shelter themselves behind the technical alleged rule which would forbid inquiry concerning what the deed actually was as between the parties and the purpose for which it was made. In *Stall v. Jones*, 47 Neb. 706, this court held: "In this state a deed absolute in form passes the legal title, although intended as security for a debt, and for most purposes treated as a mortgage." In the opinion it is said: "But in this state a deed absolute in form, although intended as security, and in general treated as a mortgage, passes the legal title to the mortgagee"—citing *Gallagher v. Giddings*, 33 Neb. 222, and *Harrington v. Birdsall*, 38 Neb. 176. But in these the question was not raised, as it is raised in this case, simply as a bar to prevent the assertion of a right otherwise considered as well founded in law and equity. In this same case of *Stall v. Jones*, Commissioner IRVINE, delivering the opinion of this court, cited *Shubert v. Stanley*, 52 Ind. 46, *Trull v. Skinner*, 17 Pick. (Mass.) 213, and *Carpenter v. Carpenter*, 70 Ill. 457, to show that, when the mortgagor voluntarily surrenders the defeasance or abandons the payment of the debt, the conveyance *then* becomes absolute and vests complete title in the mortgagee. In *Gallagher v. Giddings*, *supra*, there was neglect by plaintiff, after a decree in his favor permitting redemption, to pay the money due, and thereupon the petition was dismissed. It will be seen that in all these cases there is *something to be done before* the title of the mortgagee becomes absolute. Section 10855, Ann. St. 1911, reads: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." The quitclaim deed given in the instant case was treated by the parties to it as a mortgage, and was so intended by them. We know

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of no reason why the defendants should be allowed to have it considered as an absolute conveyance, contrary to the intention of the parties to it. Section 29 of the code provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 32." The plaintiffs are the real parties in interest, and therefore have the right to prosecute the case.

I dissent from the second paragraph of the syllabus because the same is not applicable to this case. When the former opinion was delivered, the issues under the pleadings were not the same as they are in the instant case.

I dissent as to the time when the statute of limitations should begin to run under the possession and claim of right to possession by Mrs. Helming, but under the rule laid down in *Hobson v. Huxtable*, *supra*, reluctantly concur in the judgment of affirmance which will have to be rendered.

JAMES G. HARDIN V. STATE OF NEBRASKA.

FILED NOVEMBER 1, 1912. No. 17,564.

1. **Criminal Law: PLEA IN ABATEMENT: QUESTION FOR COURT.** "Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury." *Stetter v. State*, 77 Neb. 777.
2. ———: **STATUTE: TITLE: "RAILROAD CAR."** The act known as "Senate File 150" (laws 1905, ch. 184) examined, and held that the enumeration of buildings contained within section 1 of the act, which includes "railroad car," comes fairly within and is not broader than the title.
3. **Burglary: EVIDENCE.** Evidence examined and set out in the opinion, held sufficient to establish the *corpus delicti*.
4. ———: **INFORMATION.** The information examined and set out in the opinion, held sufficient to sustain a conviction for burglary.
5. **Criminal Law: EVIDENCE: ADMISSIONS.** The evidence as to alleged admissions made by defendant examined and set out in the

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opinion, *held* insufficient to show that the admissions, if made, were obtained under threats.

6. **Burglary: EVIDENCE.** Evidence examined and set out in the opinion, *held* sufficient to sustain the conviction.

ERROR to the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

James E. Leyda, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, *contra*.

FAWCETT, J.

Defendant was convicted in the district court for Richardson county of the burglary of a railroad car in the yards of the Missouri Pacific Railway Company, in Falls City, and sentenced to a term in the penitentiary of not less than one nor more than ten years. From such conviction he prosecutes error to this court.

Plaintiff in error, who will be designated as defendant, in his brief presents and argues five specific grounds for reversal, which we will consider in the order in which they are presented. Upon the argument at the bar, counsel argued a further ground that the evidence was insufficient to sustain the verdict. This will also be considered in its order. The information charges that defendant "did, on or about the 30th day of July, A. D. 1911, in the county of Richardson and state of Nebraska, aforesaid, then and there being, then and there a railroad car of the Missouri Pacific Railway Company, a corporation duly organized under the laws of the state of Missouri, then and there being, wilfully, maliciously, forcibly, unlawfully, burglariously, and feloniously did break and enter, with intent the goods and chattels in said railroad car contained * * * to steal," etc.

When arraigned, defendant first pleaded not guilty, but later was granted leave to withdraw this plea and file a

plea in abatement, the only allegation in which was: "Because the statute under which said information is brought is invalid, in that it was not properly passed by the legislature which is purported to have enacted it." This plea was overruled, and this ruling forms the basis of defendant's first assignment, viz., "Because there was no trial of the issue presented in the plea in abatement." Under our holding in *Stetter v. State*, 77 Neb. 777, this assignment is without merit. We there held: "Where a plea in abatement in a criminal prosecution presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury."

"(2) Because the Daylight Burglary Act is unconstitutional, in that it is broader than its title." The title to the act (Senate File 150, laws 1905, ch. 184) reads: "An act to provide for the punishment of persons guilty of breaking and entering buildings of all characters, with intent to commit any felony, or with intent to steal property of any value, and to repeal sections 48 and 53 of the criminal code of Nebraska, except as to offenses heretofore committed thereunder." Section 1 of the act provides: "If any person shall wilfully, maliciously and forcibly break and enter into any dwelling house, kitchen, smoke-house, * * * station-house or railroad car, with intent to * * * commit any felony, or with intent to steal property of any value, every person so offending shall be punished by imprisonment in the penitentiary," etc. It is now contended that a railroad car is not within the title to the act for the reason that it is not a building; and numerous definitions are cited in support of this contention.

Is the statute under which the prosecution is brought invalid because in violation of the provision of section 11, art. III of the constitution, that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title?" The question is whether the *subject* of legislation is clearly expressed in the title. The subject is defined in the title of the act as "breaking and entering buildings of all characters," with intent to commit felony

or steal. Breaking and entering a railroad car is not a different subject for legislation from breaking and entering a warehouse or other permanent structure. If it were a different subject of legislation, that of itself would prevent its being united with that subject in the same act, as no act can contain more than one subject. The subject of legislation is the breaking and entering, with intent to steal or commit felony. Is it clearly expressed in the title? The argument is that, because the title limits the subject of legislation to breaking and entering "buildings of all characters," the breaking and entering of railroad cars is not included, and therefore the subject of legislation being extended in the act to cover the breaking and entering of railroad cars is not clearly expressed in the title. The title names the two former sections covering this subject and repeals them. In those sections the breaking and entering of a railroad car is included. It is manifest from the title of this act that the purpose was to enact a new law in place of the old, and to make the title general and broad. The words "of all characters" are added to the word "buildings." These words would be wholly unnecessary if it was intended to legislate only in regard to structures of a permanent character. Any one considering this title would necessarily inquire as to the purpose and force of the added words, "of all characters." The object of the constitutional provision in question is to prevent surreptitious legislation. It is intended to enable members of the legislature, and others interested, to know from the title of the act the subject of the proposed legislation. Those interested in defining the crime of breaking and entering, which was substituted for burglary of the common law, would understand that the legislation might be extended to such constructions as were included in the former acts, and which, when we consider the derivation of the word "building," are not necessarily excluded by the use of that term. The legislature considered this title sufficient to notify all parties of the subject of the proposed legislation. If we adhere to our rule that an act of the

legislature will not be held invalid as violating the constitution unless it is clearly and unavoidably so, I think we must hold that the subject of this legislation is sufficiently expressed in the title.

"(3) Because the *corpus delicti* of the crime was not proven." Defendant contends that there is no proof in the record showing that a crime was committed within the jurisdiction of the court; that is to say, that there is no proof that the car was broken into in Richardson county. The car was sealed in Kansas City, Missouri, which is about 100 miles distant from Falls City, only about four miles of that distance lying within Richardson county. It was sealed in Kansas City July 27, and reached Falls City on the evening of July 29 or the morning of July 30. The evidence of the state shows that, when the car was first observed by the agent of the railroad company, the seal was broken. Hence, it is contended that there is no evidence to show that the seal may not have been broken and the car entered before it reached Falls City. The trouble with this contention is the evidence shows that the only thing taken from the car was one box of merchandise, which was found in the weeds close to the car, and the testimony of the witness Kendrick, who was a detective in the employ of the railroad company, shows that some time along in the night following defendant's preliminary examination defendant stated to him that "Sheldon (who was jointly informed against with defendant) broke the seal with a piece of iron, and Mr. Cantley (another detective in the employ of the railway company) asked him if it was a brake shoe, and he said, 'I believe it was;'" that the witness then asked him, "What was you doing there?" and he said, "I was looking around to see if any one was coming;" that witness then said, "You were looking out, were you?" and he answered, "You can call it what you please." This testimony by the witness Kendrick is assailed upon the ground that, at the time this admission is alleged to have been made, the circumstances under which defendant is alleged to have made the ad-

missions were as follows: During the night following defendant's preliminary hearing the two railroad detectives, Kendrick and Cantley, together with the deputy sheriff and chief of police of Falls City, took defendant from the jail out into the alley between the jail and the courthouse, and there questioned defendant; that it was then that defendant is alleged to have made the admission above referred to. The testimony of Kendrick is contradicted by defendant, who testified that these parties tried to make him admit that he had assisted in breaking into the car in question; that the railroad detective had been drinking; that they had some hot words when he "denounced them as liars and perjurers;" and that the deputy sheriff then took him back to jail and locked him up. Counsel for defendant says: "Cantley is not called as a witness, and McFarland and Aldrich only corroborate Kendrick to a very slight degree." Counsel in his brief claims that the defendant asked that his attorney be called in, but no attention was paid to it, and that the railroad detective began to threaten defendant and thereby obtained from him the admission above referred to. This claim of defendant's counsel is not sustained by the evidence, as given in the abstract prepared by him, beyond the single statement that the detectives and officers referred to "tried to make him admit that he had assisted in breaking into the car in question," but no testimony is given as to any threats, nor are any facts given from which his conclusion is drawn, that they tried to make him admit his participation in the breaking. The jury saw the witnesses upon the stand and heard their testimony, and by their verdict have determined that the breaking occurred in Richardson county. The evidence of Kendrick, which, as counsel says, is corroborated "to a very slight degree" by the witnesses McFarland and Aldrich, would seem to be sufficient to sustain that finding.

"(4) Because the jury found Hardin guilty of burglary; there being no such offense in the Nebraska criminal code." Counsel relies upon *In re McVey*, 50 Neb.

481, where it was held that, "under an information against a person for the crime of burglary, he cannot be convicted of the statutory offense of breaking and entering buildings in the day-time described in section 53 of the criminal code." At the time the opinion in that case was handed down the crime of burglary was covered by section 48 of the criminal code, which limited the breaking and entering to "the night season," and, in order to obtain a conviction under that section, it was necessary to show a breaking and entering in the night-time, while section 53 covered breaking and entering in the day-time, with intent to steal or commit felony, and the court held that, under an information based upon section 48, a party could not be convicted for the offense described in section 53. By the act of 1905, sections 48 and 53 were both repealed, and Senate File No. 150, *supra*, was substituted in lieu thereof; so that the act, as we now have it, covers the breaking and entering at any time whether day or night; the words, "in the night season," having been omitted. The attempted distinction between the terms "burglary" and "breaking and entering" is, in our judgment, entirely too technical. As applied to our present criminal code, it is an attempted distinction without a difference.

"(5) Because the admissions of the defendant to the special agent of the railroad were obtained under threats." This assignment is disposed of by our discussion of assignment No. 3.

This brings us to the contention made at the bar that the verdict is not sustained by the evidence. This contention must also be held adversely to defendant. The evidence shows without question that Sheldon entered the car in the afternoon, and threw the box of merchandise out into the weeds; that during the evening of that day he and Carlson and defendant went together to the place where this box had been thrown by Sheldon; that Sheldon then took some of the property out of the box and carried it away. It is true all three of the witnesses say

that defendant took no part in rifling the box, and it is sought to show that defendant was induced to accompany Sheldon and Carlson to the yards that evening under an intimation that they had some liquor down there. It is also shown that friendly relations existed between defendant and Sheldon, so much so that, after Sheldon was arrested and locked up, defendant took some tobacco and cigarette papers to him; that while there he saw the chief of police, and asked if he could talk to Sheldon; that the chief of police asked him a few questions; that defendant told him where he worked, "and that he had come down with this fellow, meaning Sheldon, and was a friend of his." There is also the testimony of the chief of police that on the evening of July 30 he was called to the Missouri Pacific depot, where he found a box car open and some goods scattered on the ground, including a pasteboard packing box; that he took possession of the box and contents and brought them to the courthouse, including the invoice for the goods, which he checked up and found that there were missing from the box a pair of shoes, a fountain pen, and a set of knives and forks; that he afterwards found the shoes in a room occupied by Sheldon; that some days afterwards he received from one Ridley a set of knives and forks; that on the way to the depot that evening he met Sheldon and Carlson between Seventh and Eighth streets as they were coming uptown, and west of Chase street he met defendant; that it was probably a half a block or more from the car to the point where he met defendant; that when he got to the car the door was open; that he gathered up the stuff, and was starting to get a lunch when he met defendant and two Mexicans; that he stopped them, told them he was a policeman, and that defendant was under arrest. He says: "I told him to come over to me, and he came over, and I saw a box in his pocket, a pasteboard box, about the length of the knives in question." That he took the box out of defendant's pocket and shook it, told him he was under arrest and for him to stand there; that he put

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the box back into defendant's pocket, "and told him to line up with the others, three or four fellows and two Mexicans and the boys who had informed him of the car being opened. That as they lined up it was dark and they couldn't see, and Mr. Hardin (defendant) stepped back of him, and when he looked back he couldn't see him, and that he looked over and saw him go at the south end of the coal shed. That was the last he saw of him that night."

The evidence as to defendant's participation in the burglary of the car, outside of his alleged admission to the witness Kendrick, is not conclusive nor very satisfactory, but, when taken in connection with the admission testified to by Kendrick, corroborated to some extent at least, as conceded, by the witnesses McFarland and Aldrich, we think it was sufficient to sustain the verdict.

Upon consideration of the whole case, we feel that the defendant is probably guilty. The jury who heard the testimony and saw the witnesses have so found. The learned trial court, who also had the advantage of observation, which is denied to us, sustained the verdict. Under these circumstances, the judgment of the district court must be, and it is,

AFFIRMED.

REESE, C. J., dissenting.

I have read the evidence in this case, and am of the opinion that it falls far short of proving plaintiff in error guilty of any crime.

LETTON, J., dissenting.

Section 251, criminal code, provides: "This code and every other law upon the subject of crime which may be enacted shall be construed according to the plain import of the language in which it is written, * * * and no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit." To call a rail-

road car of any description a building is certainly an unusual use of that term. The word "building," if construed according to its plain import, as the statute requires, would not include an inclosed railway car; because I think no lexicographer has included any type of vehicle within the meaning of the word "building." Suppose that the legislature in the same act had included carriages, street railway cars, hacks, closed delivery wagons, and automobiles with inclosed bodies, would we say that these came properly within the term "building"? The legislature evidently made an oversight. We cannot make a new definition for the word "building" in order to remedy this omission.

HAMER, J., dissenting.

I have carefully read all the evidence. There are 156 pages in the bill of exceptions besides the exhibits. After a careful consideration of the testimony, I do not find it sufficient to sustain a verdict. To understand the evidence, it is necessary to quote from the testimony.

L. L. Aldrich, the chief of police, testified to finding a box car open and goods taken out and scattered around. A pasteboard box about $2\frac{1}{2}$ feet long by 15 to 18 inches wide was found broken open in the weeds close by the car. There were packages of tea and other articles in the neighborhood of the box. There was an invoice bill, "Exhibit A." When the goods were checked up according to this invoice bill, there was a shortage. The things gone were shoes, a fountain pen, and a set of knives and forks. There was a railroad bill accompanying the bill of lading. The chief of police and his assistant found shoes in the City Hotel. They were in the room occupied by Thomas Sheldon. There was a shoe box and fountain pen and a corset cover, ten boxes of tea, and other articles. When going down to the car Aldrich met "Tom Sheldon and Carlson coming up between Seventh and Eighth streets on Stone street." He testified, "As I came down

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west on Chase and Seventh, I met Mr. Hardin," the defendant. Aldrich testified that Hardin was talking to a couple of Mexicans. It was 20 or 30 minutes after nine. When Aldrich first met Hardin, Hardin was going away from the direction of the car, and was not nearer to the car than half a block or more. He was then on the sidewalk. The car that had been opened was "right north of the west end of the depot," and 50 feet or more from the depot on the north side. It was on the north track nearest the tank. On the east side of the tank there is an embankment. The door of the car was open when Aldrich arrived. The car which was open was next to the north track. There were no dwellings north or east of the car until one got on the hill. East of there are the Mausts coal sheds. Aldrich told the defendant, who was then talking with the Mexicans, that he was a policeman, and to come to him. There was a pasteboard box in the defendant's pocket that had a heavy cord tied around it. Three or four men and two Mexicans were there, also the boys who told Aldrich of the car being opened. Aldrich testified that Hardin stepped back of him, that when he looked back he could not see Hardin, and when he asked where the other man was Hardin said "over there," and when Aldrich went over he found the Mexicans still there, but Hardin had gone over the south end of the coal sheds, and Aldrich saw him no more that night. East and south-east of the car were some cars and Gillespie's boarding house. There were some knives and forks which were gotten from Joe Ridley who was arrested by Aldrich. After this the defendant was arrested by Aldrich at the Missouri Pacific shops Friday afternoon. On cross-examination Aldrich testified that it might have been a block away from the car where he met the defendant; that there was no attempt to steal the stuff taken from the car; that the defendant came up afterwards to where Aldrich was at work; that the defendant went back to where Aldrich was when Aldrich was looking at the stuff; that there were seven or eight people around there; that

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the defendant was not trying to run away; that he went to Gillespie's boarding house and searched the defendant's room. From the depot to the Missouri Pacific shops is a good half mile. Aldrich arrested Sheldon at the northeast corner of Fifteenth and Stone streets, about ten blocks from the depot. He arrested Carlson at John Wilson's. Aldrich did not know whether the car was broken open where it stood, or whether it was open when it came into Falls City, and did not know that the car had been broken by any of the defendants. There were with Aldrich at the car Rice McDonald, Frank Gamblin, two Mexicans, and two boys who called him down to the depot.

Joseph Ridley, a locomotive fireman, testified that when he went to get his engine that morning, and at just about the middle of the stockyards, he saw and picked up a little box containing a set of silver knives and forks. It was southeast of the Missouri Pacific depot, the direction in which the stockyards lay and where the road ran.

R. R. McNulty testified that the defendant was drunk that night; that the defendant was out in the mudhole and staggered around; that the defendant walked up to where the men were near the car that was open, and then staggered into the mudhole. It does not seem likely he would have done this if he had been guilty.

James Kendrick, the detective in the service of the railroad company, testified in a way that was unsatisfactory. He could not remember whether he was sworn at the preliminary. He seemed to have so many cases on hand that he got confused. There were three cases—Hardin, Sheldon, and Carlson. He could not remember whether he had talked with the defendant. He was not certain of anything, except that the defendant told him that he had been in the penitentiary. He was not sure what he had testified to before; and he might have testified that the defendant told him that he saw the seal broken, and then he might not. He denied testifying at the preliminary examination that the defendant had told him that "these

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parties were down there; the three of them were down there together, and he started off while they broke the car, and Sheldon jumped in and took the box out, and he saw them taken out to the head of the weeds." Possibly this witness testified to that, but he did not remember whether he did or not; also he didn't remember whether he was at Judge Spraggen's court when they were trying Sheldon; but, when asked if he was there at the time they tried Carlson, he testified: "The chances are I was." When asked whether he tried to get the defendant to waive his preliminary examination, he didn't remember whether he did or not. He finally denied that he had any talk with him personally, and said his talk was with a Mr. Cantley. He could not remember the words used by Mr. Hardin at the preliminary hearing. When asked if he had not testified that the defendant said he was down there with these two people, that he met them down there, that he was standing down there, and that they went to the car and took these boxes and hid them in the weeds, he said he did not remember anything at all about it. When he was further asked about the matter he said: "I disremember the proceedings down there."

One Ruezsegger testified that he was the clerk at Kansas City, but would not undertake to say where the seal of the car was broken; that the car would stop at several points between Kansas City and Falls City.

Dennis O'Connell, the seal clerk, testified that he did not know whether the car had been in the Kansas City yards.

L. L. Aldrich was recalled as a witness for the state, and testified that the defendant said that he was there when the car was opened, and that Tom Sheldon broke the seal; and he also testified that the defendant said that Tom Sheldon took the goods out of the car.

James McFarland testified that the defendant told him that he did not break into the car, but that Sheldon broke into the car.

Thomas Sheldon testified as a witness for the defendant

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that he was one of the defendants informed against along with Albert Carlson, and that he had entered a plea of guilty to the charge made against him, that of breaking and entering into this same box car, and that he saw Hardin about 7 o'clock in the evening, which was the first time that he had seen him on that day, and that the car was open when he first saw it; that he took the box and threw it down in the weeds; that Hardin saw the box out there in the weeds, and that that was the first time Hardin had seen it to the best of his knowledge; that Hardin had nothing whatever to do with breaking the car; that he, Sheldon, found the car open at 3 o'clock in the afternoon. And on cross-examination Sheldon testified that Carlson went down with him to the train that afternoon, and that Carlson took the goods out of the car, and that the defendant was not there in the afternoon; that he, Sheldon, and Carlson went down to the car and got the box and threw it in the weeds, and that they did not meet Hardin until 7:30 that night; that he, Sheldon, took the shoes that night, and with Carlson and Hardin went through the box that night, but this was after he had taken the box and had thrown it in the weeds; that when he went up town Carlson went with him; that he met Hardin at Rawlins, Wyoming, and that he afterwards met Hardin in Omaha just before coming to Falls City.

Albert Carlson testified that he and Tom Sheldon went down to the depot about 2 o'clock in the afternoon, and that Hardin was not with them, and they did not see Hardin until 7 or 8 o'clock that evening; that he (Carlson) and Hardin did not take anything from the box; that they went up town and Hardin went home; that Tom Sheldon went into the car and told him he was looking for a fine suit of clothes, and that when the stuff was taken out of the car Hardin "was not around there at all."

O. S. Larson testified that he was the gang foreman at the Pacific shops, and that the defendant worked for

him; that he ran a drill press, and that Hardin worked at the shop on the Sunday before the day of his arrest, and that he worked there all day. His testimony corroborates the testimony of Larson and Sheldon that Hardin had nothing to do with the crime of breaking into the car.

S. A. Moore testified to the same thing—that Hardin operated a drill press and worked that Sunday and up to the day of his arrest, that he worked all that Sunday in the Missouri Pacific shops.

The defendant Hardin testified, that he boarded at Gillespie's hotel; that he met Sheldon that night on Stone street, and that Carlson told him that "he had some stuff planted and he wanted to go and get it;" that he met Sheldon and tried to get Sheldon to pay him \$5 that he owed him; that Sheldon said, "Come on, let's go down to the depot, I got some shoes down there;" that when they got down to the depot they were still arguing about the \$5, and that Sheldon turned off and went down the track and went over in the weeds and got a box and broke it open; that Carlson told him not to do that; that they were not going to have anything to do with it; that he saw Sheldon put the shoes in his bosom, and that they then went to the Gillespie hotel; that he did not take any of the stuff down at the depot; that he did not stand guard there; that it was Sunday evening, and they all had their coats on; that Cantley was the drunkest; that Cantley put his leg on his and leaned over onto him, and promised that he would see the master mechanic and would see that he did not lose his job.

The defendant admitted being in the penitentiary in Wyoming for passing a fraudulent check. He seems also to have been in the penitentiary in Texas because of a shooting case, and he testified that he proved by several witnesses that the man in Texas shot the first shot at him, and that he then shot in self-defense. He was a bookkeeper in the penitentiary in Wyoming, and received his pardon for good conduct.

We think that it clearly appears from the evidence that the defendant had nothing to do with the breaking. He was not down to the depot that afternoon according to the weight of the testimony, and he had nothing whatever to do with the breaking into the car. That he is innocent of the crime charged seems to be established by the uncontroverted evidence of Larson and Moore; and their testimony corroborates the testimony of Carlson and Sheldon. The defendant may not be a good citizen, but he should not be convicted and sent to the penitentiary unless he is guilty of the crime charged against him.

STATE, EX REL. NEBRASKA REPUBLICAN STATE CENTRAL
COMMITTEE ET AL., APPELLEES, V. ADDISON WAIT,
SECRETARY OF STATE, APPELLANT.

FILED NOVEMBER 1, 1912. No. 17,841.

1. **Elections: NOMINATIONS: POLITICAL PARTIES.** Chapter 26, Comp. St. 1911, clearly recognizes the existence of political parties, and delegates to the members of each party the right to vote at primaries and general elections for candidates of their own party, nominated by themselves without the interference of members of any other political party.
2. ———: ———: **PRESIDENTIAL ELECTORS.** The preferential vote given by the voters of a political party at a primary election for a particular person as the party candidate for president, while morally binding upon the delegates of such party to the national convention, has no relation whatever to candidates nominated at such primary for presidential electors.
3. ———: ———: ———. Persons nominated by a political party at a primary election as candidates for presidential electors are nominated, not as electors to vote for any particular candidate then known, but to vote, if elected, for the persons who may subsequently be nominated by the national convention of such party as candidates for the offices of president and vice president.
4. ———: **PRESIDENTIAL ELECTORS: VACANCY.** It is a well-settled rule at common law that if a person, while occupying one office,

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accepts another incompatible with the first, he, *ipso facto*, vacates the first office, and his title thereto is thereby terminated without any other act or proceeding.

5. ———: ———: ———. In such a case one of the tests of incompatibility is whether the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for the incumbent to retain both.
6. ———: ———: FILLING VACANCY. Where it appears that acts or events have occurred rendering an office vacant, the authority having the power to fill such vacancy may treat the office as vacant and proceed to elect or appoint, according to the form of law, another to fill it.
7. ———: RIGHTS OF VOTER: ENFORCEMENT. By the statutes of this state, every voter has the right, by a single cross, or by one manipulation of the lever of a voting machine, to vote a straight ticket for the candidates of his party; and it is the right of the governing body or committee of a political party to appeal to the court to enforce such right.
8. ———: POLITICAL PARTIES: GOVERNING BODY. Under the statutes of Nebraska, the national convention of a political party, or, when the convention is not in session, its national central committee is the supreme governing body of such party as to national affairs, and has full authority to decide which of rival conventions or committees in the state is the regular and duly authorized convention or committee of such party.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, ALBERT J. CORNISH and WILLARD E.
STEWART, JUDGES. *Affirmed.*

*Grant G. Martin, Attorney General, George W. Ayres
and C. C. Flansburg, for appellant.*

*John L. Webster, A. W. Jefferis, Norris Brown, Aaron
Wall, Amos Thomas and Frank M. Hall, contra.*

FAWCETT, J.

Appeal from a judgment of the district court for Lancaster county, awarding relators a peremptory writ of mandamus requiring the respondent to print upon the official ballot to be used at the general election in Novem-

ber, 1912, the names of certain persons as republican presidential electors.

This case was decided October 23, but for reasons well known to the parties the writing of the opinion was left to a later date. The intention of the writer, to whom the case fell in the regular course of assignment of cases, was to write the opinion at his leisure; but upon consultation we all agreed that the writing of the opinion should be hastened, so that the reasons for our decision may be given to the public.

Article I, sec. 22, of the constitution of Nebraska provides: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Article II, sec. 2, of the constitution of the United States provides for the election of presidential electors in each state, in such manner as the legislature thereof may direct, the number of electors to equal the number of the state's senators and representatives in congress. Article XII, sec. 1, provides that such electors shall meet in their respective states and vote by ballot for president and vice president, make lists of the number of persons voted for, the number of votes for each, and transmit such lists duly certified to the seat of government, directed to the president of the senate.

A large number of voters of Nebraska, regardless of party, having become dissatisfied with the old order of nominating candidates for office by delegate convention, determined, if possible, to change those conditions and secure the nomination of all officers, state, district, and county, by a direct vote of the people, and to that end secured, in 1907, the adoption of a primary law which provided for the nomination of such officers by the various political parties of the state in a state-wide primary. In 1909 the legislature conceived the idea of having an open primary, and amended the then existing law so that the members of one party might, without restraint, vote for the nomination of candidates for office in any other

party. One trial of that law satisfied all parties that it was wrong in principle, and the legislature of 1911 returned to the closed primary idea and enacted the primary and election law now in force. By the terms of that act, this case must be determined. The provisions of the law, as it now stands, will be found in chapter 26, Comp. St. 1911, and the references hereinafter made to certain sections of the law will, without so stating, be understood to be sections of that chapter.

Section 101: "Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows: 1. The resignation of the incumbent. 2. His death. 3. His removal from office. 4. The decision of a competent tribunal declaring his office vacant. * * * 7. A forfeiture of office as provided by any law of the state."

Section 117d, subd. sec. 1b: "When candidates for offices of president and vice president of the United States are to be nominated, every qualified elector of a political party subject to this act shall have opportunity to vote his preference, on his party nominating ballot, for his choice for one person to be the candidate of his political party for president, and one person to be the candidate of his political party for vice president of the United States. * * * The names of any persons shall be so printed on said ballots solely on the petition of their political supporters in Nebraska, without such persons themselves signing any petition or acceptance. The names of persons in such political party who shall be presented by petition of their supporters to be party candidates for president and vice president of the United States, shall be printed on the nominating ballot, and the ballot shall be marked, and the votes shall be counted, canvassed and returned in like manner and under the same conditions as to names, petitions and other matters, as far as the same are applicable, as the names and petitions of aspirants for the party nominations for the office of governor

are now or may be by law required to be marked, filed," etc.

Section 117f: "In case a nomination shall be made by electors other than the candidate, said nominee shall within five days after the date said certificate shall be filed with the officer, file a statement in writing, duly verified under oath, stating that he affiliates with the party named in said certificate, that he will abide by the results of said primary, and if elected will qualify and serve as such officer. In case said statement shall not be filed within five days, the name of the candidate in the petition shall not be placed upon the primary ballot."

Section 117r: "Any qualified elector desiring to vote at any primary election held under the provisions of this act shall be entitled to participate in such primary election upon presenting himself at the polling place where he is entitled to vote; but he shall not be entitled to receive a primary ballot, or be entitled to vote at such primary election, until he shall have first stated to the judges of said primary election what political party he affiliates with."

Section 118a: "Vacancies occurring upon any party ticket after the holding of any primary shall be filled by a majority vote of the party committee of the city, district, county or state, as the case may be, and a certificate of such nomination shall be filed as required by section 5776 of Cobbey's Annotated Statutes, 1903."

Section 118p: "All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of this act, shall be deemed to be valid, unless objections thereto shall be duly made in writing within three (3) days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination or in the nomination affidavits of such persons, on file in that office. Objections to the use of party name may also be

made and passed upon in the same manner as objections to certificates and nomination statements. The officer with whom the original certificate was filed, or who made an affidavit to the original nominating statement, shall, in the first instance, pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by a county court, or by a judge of the district court, or by a justice of the supreme court at chambers, on or before the second Wednesday preceding the election. Such order may be made summarily upon application of any party interested, and upon such notice as the court or judge may require."

Section 118q: "In case of a division of any party, the secretary of state shall give the preference of party name to the convention held at the time and place designated in the call of the regularly constituted party authorities, and if the other faction or factions shall present no other party name, the secretary of state shall select a name or title, and place the same on the ballots before the list of candidates of said faction. The action of the preceding national convention of such party, regularly called, shall determine the action of the secretary of state, or the court in its decision. The secretary of state may be compelled by peremptory order of mandamus proceedings to perform his duty in this regard."

Section 125r: "No voting machine shall be approved by the state board of voting machine commissioners unless it shall be so constructed as to insure every voter an opportunity to vote in secrecy; that each machine shall be so constructed as to provide facilities for voting for the candidates of at least seven parties or organizations; that a straight party ticket can be voted by the operation of a single device; * * * that the voter cannot cast more than one vote for any candidate, or vote for more than one person for the same office, unless he is lawfully entitled to vote for more than one person therefor, and in that event can vote for as many persons for that office as he is by law entitled to vote for, and no more; that the

names of the candidates for presidential electors need not appear on the ballot labels, but in lieu thereof, one ballot in each party column, or row, may contain only the words 'presidential electors' preceded by the party name, and the names of the candidates for president and vice president, and every vote registered for such ballot shall operate as a vote for all candidates of such party for presidential electors."

Section 140: "All official ballots prepared under the provisions of this act shall be white in color, six inches wide, and of a good quality of news printing paper, and the names shall be printed thereon in black ink. At the top and left side of the ballot shall be printed in black-faced capital type, not less than one-eighth of an inch high, the name of each party having candidates on the ballot; and to the right of each party name, a circle one-half inch in diameter, with leaders connecting the party name to the circle. Over the top circle shall appear the following printed instructions: 'To Vote a Straight Ticket Make a Cross Within Your Party Circle.' Every ballot shall further contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names and the name of no candidate shall appear on the ballot more than once."

That the legislature by the chapter above outlined has deliberately and clearly recognized the existence of political parties and attempted to delegate to the members of each party the right to vote at the primaries and at the general election for candidates of their own party, and nominated by themselves without interference of members of any other political party, is too clear to require discussion. In *State v. Drexel*, 74 Neb. 776, 786, Mr. Chief Justice HOLCOMB, speaking for this court, said: "It is quite true, we think, that when the legislature undertakes by laws of this character to regulate and control the internal affairs of political parties, and to determine the manner and method of making party nominations for

public offices, it must do so without discrimination and with equal consideration and benefit to all. But it is equally necessary to recognize the existence of political parties and to classify them by some convenient standard." In that opinion Judge HOLCOMB quotes with approval from *State v. Jensen*, 86 Minn. 19, as follows: "We are of the opinion that the legislature may classify political parties with reference to differences in party conditions and numerical strength, and prescribe how each class shall select its candidates; but it cannot do so arbitrarily, and confer upon one class important privileges and partisan advantages and deny them to another class, and hamper it with unfair and unnecessary burdens and restrictions in the selection of its candidates."

At the primary election in April last, the republican voters were given the opportunity to express their preference for the man whom they desired to have nominated as the candidate of the republican party for the office of president. By quite a large majority Theodore Roosevelt was named as such choice. The delegates also elected at that primary to attend the republican national convention to convene in Chicago in June following were by that vote instructed to cast the solid vote of Nebraska for Mr. Roosevelt. Beyond the sitting of that convention and the nomination of a president and vice president by republican delegates of the nation there assembled, neither the duties of such delegates, nor the expression of a preference for Mr. Roosevelt by that primary, extended. The preferential vote given for Mr. Roosevelt had no relation whatever to the candidates nominated at that primary for presidential electors. It was not and could not at that time be known who would be the nominee of the national convention.

The candidates for presidential electors were nominated, not to vote for any particular candidate then known, but to vote, if elected at the November election, for the persons who might be nominated by the national convention as the candidates of the republican party for

the offices of president and vice president. At the primary election A. V. Pease, W. J. Broatch, George S. Flory, W. E. Thorné, A. R. Davis, Allen Johnson, Wesley T. Wilcox, and Alfred C. Kennedy were nominated as republican presidential electors for the state of Nebraska, to be voted for at the ensuing general election. In behalf of each of the eight persons so nominated, there had, prior to the primary, been filed with the secretary of state a petition, wherein it was represented: "We, the undersigned qualified electors of ——— County, in the state of Nebraska, affiliating with the republican party, hereby request that the name of (each of the gentlemen above named) be placed upon the official ballot of said party for the primary election to be held on the 19th day of April, 1912, as a candidate for the office of presidential elector at large." Each of the gentlemen named filed, over his respective signature, an acceptance of his nomination, as follows: "To the Honorable Secretary of State, Lincoln, Nebraska. Dear Sir: I hereby accept the nomination for the office of presidential elector at large on the republican ticket in accordance with petition filed in your office." By the acceptance of that nomination at the hands of persons "affiliating with the republican party," they pledged themselves to discharge their duties, if elected, by voting for the candidates for president and vice president who should be subsequently nominated by the national convention of that party. We are all agreed that any other construction would be farcical. When the national convention met in Chicago, it transpired that Mr. Roosevelt was not nominated as the candidate of the republican party for president, but that Mr. Taft became the nominee of that convention for president, and Mr. Sherman became the nominee for vice president. They thereby became the candidates of the republican party for those offices, and the gentlemen named, having been nominated as presidential electors upon the republican ticket, thereby became in honor bound to vote for such nominees.

Syllabus.

After the adjournment of the republican national convention in 1912, the party was organized to be known and designated as the "Progressive Party." At a national convention of that party, subsequently called, Mr. Roosevelt was nominated for president. Among other resolutions of this state in that behalf, it was resolved to send delegates from the republican party, duly organized as a new party in this state under the name of the progressive party. That convention had adopted the platform of Mr. Roosevelt and the platform which had been adopted by its national convention in Chicago, with the platform it is contended by all parties in this state to be in every respect in marked variance from the platform of the republican party. The state convention of that party nominated candidates for the various state offices, and also nominated eight presidential electors, six of whom were Messrs. Pease, Breatch, Flory, Thorne, Davis and Johnson. The six gentlemen named have not declined such nomination by the progressive party, but, on the contrary, by their conduct clearly show that it is their intention, if elected, to vote for the candidates of the progressive party, to wit, Mr. Roosevelt and Mr. Johnson for president and vice president, respectively. As an attempted justification of such action on their part, it was argued by counsel at the bar that, as about 80 per cent. of the republicans who voted at the April primary expressed their preference for Mr. Roosevelt as a candidate for president, the electors were thereby in effect instructed to vote for him at the November election, and that in the course they are pursuing they are simply carrying out those instructions. It was also said there is no proof in the record that either of these gentlemen has declared an intention to vote for Mr. Roosevelt. In this counsel are in error; but, if proof from witnesses were lacking, the above declaration by counsel at the bar clearly establishes the allegation of the relator that such is their determination.

It is contended by relator that, by this action on the

part of the gentlemen named, the office of each as a candidate upon the republican ticket for presidential elector became vacant, and his right to remain upon the republican ticket as a candidate for presidential elector became forfeited as effectually as if he had resigned therefrom. We are all agreed that this contention is not only founded upon high moral grounds, but is also supported by the clear current of authorities. While a nomination as a candidate for election to an office does not make the nominee, strictly speaking, an officer, he is in his relation to the party which placed its confidence in him a *quasi* officer, and his duties are to be measured by that relation.

In *State v. Anderson*, 136 N. W. (Ia.) 128, it is said: "In *Bryan v. Cattell*, 15 Ia. 538, this court held that, in determining whether a vacancy exists in an office, we are not confined to statutory causes, but may declare it vacant if it is incompatible with the office held. It is a well-settled rule of common law that if a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' (Citing numerous cases.) The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. *Bryan v. Cattell*, *supra*. But that the test of incompatibility is whether there is 'an inconsistency in the functions of the two, as where one is subordinate to the other 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' (Citing cases.) A still different definition has been adopted by several courts. It is held that in-

compatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' (Citing numerous cases.)"

In the notes to *Attorney General v. Oakman*, 86 Am. St. Rep. 574, 578 (126 Mich. 717) it is said: "The rule is well settled at common law that if a person, while occupying one office, accepts another incompatible with the first, he, *ipso facto*, vacates the first office, and his title thereto is thereby terminated without any other act or proceeding. (Citing numerous cases.) * * * The public has a right to know which office is held and which surrendered. It should not be left to chance, or to the uncertain whim of the office-holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public. (Citing cases.)"

In *State v. Goff*, 15 R. I. 505, it is held: "An officeholder accepting a second office incompatible with the first vacates his first office." In the opinion it is said: "It is well settled that, when a person accepts an office incompatible with one which he then holds, he thereby impliedly resigns or vacates his former office."

In *Attorney General v. Common Council*, 112 Mich. 145, 168, it is held: "A person who, while occupying one office, accepts another incompatible with the first, *ipso facto* vacates the first office." In the opinion it is said: "It is the universal rule that, when such incompatibility exists, the acceptance of the latter office vacates the first. *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921, and authorities there cited. The authorities are in substantial agreement as to the rule of incompatibility, and Mechem states it as follows: 'This incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both.'"

The situation presented in the case at bar is more than one of mere incompatibility. Here the persons who have been nominated as presidential electors, having, if elected, but a single duty to perform, viz., to vote for the candidates nominated by the party by whose votes they were themselves nominated, openly declare that they will not perform that duty, but will vote for the candidates of another and distinctly antagonistic party. This would make performance of their duty impossible, and a judicial determination of the existence of a vacancy was, therefore, unnecessary. The candidates had, by their own acts, vacated their places as republican presidential electors. This action on their part *ipso facto* created six vacancies on the republican ticket for electors. These vacancies the duly recognized republican state central committee had a right to fill, and its action in that behalf is binding, not only on the secretary of state, but on the court as well.

In *Prather v. Hart*, 17 Neb. 598, we held: "Where it appears *prima facie* that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority having the power to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy, to appoint or elect, according to the form of law, a person to fill it."

In *Bell v. Templin*, 26 Neb. 249, Judge MAXWELL said: "A tribunal to determine contested elections need not be, strictly speaking, a judicial body, the powers exercised being *quasi* political and administrative."

In *State v. Drexel*, 74 Neb. 776, 788, the following language by Mr. Chief Justice HOLCOMB is instructive: "By section 19' of the act the right of an elector to vote at a primary is made to depend upon his political affiliation with the party for whose candidates he desires to cast a ballot. It is therein provided that no person shall be entitled to vote at such primary election until he shall have first stated to the judges of said primary election

what political party he affiliates with, and whose candidates he supported at the last election, and whose candidates he intends to support at the next election.' Provisions are also made for challenging any person offering to vote at such primary election, and for his making oath to the truth of the statements above required as to party affiliation and his support of candidates of the party with whom he is offering to vote. It is difficult to perceive any valid objection to provisions of this character, when applied to a primary election law. These laws replace party nominating conventions. The regulation of the membership of the party and of the right to participate in the nomination of its candidates, in this respect, is taken from the party and placed in the control of the legislature. The integrity of the party and the success of its principles and policies can be best maintained by the participation in its affairs of those only who are at heart in sympathy with the objects and ends to be attained by the organization, and loyal to its tenets. An indiscriminate right to vote at a primary would tend, in many instances, to thwart the purposes of the organization and destroy the party. A hindrance to one, not a member of a party, from participating in the selection of the party's delegates and candidates can in no proper sense be said to interfere with the free exercise of the elective franchise as guaranteed by the constitution. All that is required is that the party offering to vote at the primary, in order to be entitled to vote with either of the parties engaged in nominating candidates thereat, shall have affiliated with such party, supported its candidates generally at the last election, and intend to do so at the next. Open declaration of allegiance to party is absolutely essential to the proper working of any primary law. 'By his mere offer to vote for delegates to a convention of any party, the elector does, in effect, declare his intention to support the nominees of such convention, and the oath is provided for as a guaranty of the truth of the declaration already made by such offer to vote.'

Rebstock v. Superior Court, 146 Cal. 308, 316, 80 Pac. 65."

When the republican state convention assembled in July, it was found to be antagonistic to the nominees of the national convention. Therefore a considerable minority of the delegates withdrew, assembled in another room, organized as a convention, indorsed the nominees of the national convention, and selected a state central committee. A like committee was also selected by the first convention. The central committee of the second convention set actively to work for the nominees of the national convention, while the other committee devoted its energies exclusively to the republican state ticket. The republican national committee on September 18, by unanimous vote, resolved that the second convention noted "be and is hereby recognized by the national republican committee as the regular republican organization of the state of Nebraska;" and "that the republican state central committee, of which Hon. F. M. Currie is chairman, and appointed by the said republican state convention, be and is hereby recognized as the regular republican state central committee of the state of Nebraska." On September 11 the Taft committee, as we may term it, met and adopted a preamble and resolutions declaring that the six electors, Pease, Broatch, Flory, Thorne, Davis, and Johnson, had, since the holding of the primary, declared their intentions, respectively, if elected as presidential electors, to vote for the nominees of the progressive party for president and vice president, and had thereby repudiated their allegiance to the republican party, repudiated and revoked the certificate of their nomination filed with the secretary of state, repudiated their acceptance of said nomination, and had betrayed their trust as republican presidential electors; therefore it was resolved that their right to "remain candidates for presidential electors on the republican ticket has become forfeited, and is terminated and vacated." At a later meeting, on September 24, the committee nominated C.

F. Reavis, George D. Smith, W. H. Kilpatrick, O. A. Abbott, Daniel B. Jenckes, and Vac Buresh as presidential electors in place of Pease, Broatch, Flory, Thorne, Davis, and Johnson. On October 9 they presented to respondent, secretary of state, a petition and certificate of nomination, in which it was recited that Pease and others had forfeited and vacated their right to appear upon the ballots at the November election as republican presidential electors; that by reason of the premises six vacancies existed in the list of republican presidential electors; that the committee had so declared, and had nominated Reavis and others to fill such vacancies; and demanded that their names be, by the secretary, printed on the ballots for the November election as republican presidential electors. The preambles and resolutions of the two meetings of the committee were attached to and made a part of their petition and certificate. No written objections to the certificate of nominations to fill vacancies filed by the committee were filed with the secretary of state, in the manner and within the time required by section 118p, *supra*. The right, therefore, of the committee to act in the premises is not questioned. Their demand was refused by the secretary of state, whereupon relators applied to the district court for Lancaster county for a writ of mandamus to compel him to print the names of the persons so nominated by the committee upon the official ballot as republican presidential electors. On a hearing before the three judges of that court, a writ was awarded as prayed. We are now asked to reverse that judgment.

At the time the electors were nominated at the April primary, there were but two parties which could hope to succeed in electing a presidential ticket at the November election. Since the holding of the primary and since the national conventions of these two parties, the progressive party has been organized, and is now competing with the republican and democratic parties for the election of its candidates for president and vice president, with the

hope, and possibility, of its succeeding in so doing. We have recognized that party in *Morrissey v. Wait*, ante, p. 271. The progressive party therefore now has the same legal status before the voters of this state as either of the other two parties. Any voter who desires to cast his vote for Mr. Roosevelt for president and for the other nominees of the progressive party may do so by making a cross in the party circle of that party in precincts where the voting machine is not used, and by a single manipulation of the lever of the voting machine where such machines are used. A voter who desires to vote for the candidates of the democratic party may register his vote in the same manner. But, if the decision of the respondent be sustained, no voter can so vote for the candidates upon the republican ticket. By far the greater number of voters do not know the various candidates for electors, but they do know for whom they want to vote for president and vice president. They have been in the habit in the past of voting a straight ticket, and particularly so for presidential electors. It is rare indeed that a voter "scratches" that part of his ticket. He votes for entire strangers about whom he has never read, or made inquiry, because of the fact that they stand for the candidates whose election he desires. To deprive the voters who desire to vote a straight republican ticket of the opportunity of doing so, and at the same time afford such opportunity to the voters of the other parties named, would be repugnant to every sense of honor, and would be in defiance of the just rule that important privileges and partisan advantages cannot be conferred upon one class and denied to another class by hampering it with unfair and unnecessary burdens and restrictions.

The right of every voter, by a single cross or by one manipulation of the lever of a voting machine, to vote a straight ticket for the candidates of his party is guaranteed by sections 125r and 140, *supra*. Any attempt, by deception or otherwise, to deprive him of that right is a violation of both the letter and spirit of our laws. If

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such an attempt is made, it is the right of the governing body or committee of his party to appeal to the courts, if necessary, to protect him; and, when it is made to appear that such an attempt is intended, it is the duty of the court to prevent it. To permit the names of the six electors, who will not vote for the candidates of the republican party for president and vice president, but will vote for the candidates of another and different party, to be printed upon the official ballot as republican electors would be a gross deception, and would, without the possibility of a doubt, cause thousands of voters in this state to cast their votes for president and vice president for candidates other than their choice, and other than the candidates for whom it is their desire to vote. We cannot permit this to be done.

The judgment of the district court is therefore

AFFIRMED.

**PATRICK J. TIERNEY, APPELLEE, v. EDWIN EVANS, SHERIFF,
ET AL., APPELLANTS.**

FILED NOVEMBER 1, 1912. No. 16,823.

- 1. Judgment: REVIVOR.** Revivor of a dormant judgment under our statute has no other effect than to reinstate the judgment and authorize execution to collect the same.
- 2. ———: ———: PARTIES.** One not a party to the original judgment who fails to appear upon service of the conditional order of revivor is not made a party to the judgment by the final order reviving the same.
- 3. Execution: INJUNCTION.** One who was not a party to the proceedings in which judgment is entered may enjoin the levy of an execution upon his property to collect such judgment.

**APPEAL from the district court for Boone county:
JAMES N. PAUL, JUDGE. Affirmed.**

France & France and H. C. Vail, for appellants.

F. J. Mack and C. E. Spear, contra.

SEDGWICK, J.

In December, 1883, the St. Paul Harvester Works recovered a judgment in the county court of Boone county against Patrick Tierney. In August, 1909, the St. Paul Harvester Works filed in that court a motion and affidavit for a revivor of the judgment. A conditional order of revivor was made by the court, which was served upon this plaintiff. The sheriff's return upon the order shows that he served it personally upon "the within named Pat Tierney." This plaintiff made no appearance in the proceedings. Upon this return an order of revivor was made by the county court. Execution was then issued upon the judgment, and, the sheriff being about to levy upon the property of this plaintiff, this action was brought in the district court for Boone county against the sheriff and the county judge to restrain them from enforcing the judgment against this plaintiff. A temporary injunction was allowed, and upon the trial the injunction was made perpetual, and the defendants have appealed.

The plaintiff upon the trial testified that at the time of the entering of the judgment he was not of legal age, and was residing in the state of Missouri; that two or three years afterwards he removed to Madison county, in this state, where he resided for 19 years, and then removed to Boone county, where he had resided about 4 years at the time the conditional order of revivor was served upon him; that he never had any transactions whatever with the St. Paul Harvester Works, and was never sued by them, and that no summons had ever been served upon him at their suit. In this testimony he was supported by several witnesses, from which it appears that this plaintiff was not the party against whom the judgment of the St. Paul Harvester Works was rendered. The defendants offered no evidence upon this question, and rested their case upon the proposition that this plaintiff was bound by the order of revivor, and was estopped to deny that the judgment was against him. This posi-

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tion of the defendants is wholly untenable. A judgment against one who has not been served with process and has made no appearance is not merely voidable; it is absolutely void. As said in *McKinney v. Frankfort & State Line Co.*, 140 Ind. 95, it "is a mere nullity." The evidence clearly shows that the judgment against Patrick Tierney was not a judgment against this plaintiff, Patrick J. Tierney. This plaintiff was never sued nor served, and as against him the judgment is a nullity. The proceeding in this state to revive a dormant judgment is not a new action, but is a continuation of the old. It takes the place of the old common law writ of *scire facias* for that purpose. This was early determined in this state in *Eaton v. Hasty*, 6 Neb. 419, where the authorities are cited and the matter fully considered. In that case it was sought to make the order of revivor determine certain rights of the parties. The effect of a judgment of revivor is stated in the first paragraph of the syllabus: "A judgment of revival is merely a continuation of the original action, and continues the vitality of the original judgment with all its incidents from the time of its rendition." This conclusion was cited and approved by this court in *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170. In this latter case the court said: "It is not the commencement of a civil action, but the continuation of an action previously commenced. The object in view is not to obtain a judgment, but to obtain permission of the court to execute a judgment already in existence."

Other interesting and important questions are presented in the brief, but are not necessary to this decision. There never having been any judgment against this plaintiff, and the order of revivor having no other effect than to renew the former judgment, there was no authority to levy the execution on the property of this plaintiff, and the judgment of the district court is

AFFIRMED.

STATE, EX REL. AMY M. MURPHY ET AL., RELATORS, V. GUY
T. GRAVES, JUDGE, RESPONDENT.

FILED NOVEMBER 1, 1912. No. 17,587.

1. **Mandamus: VACATION OF INJUNCTION.** This court has jurisdiction by mandamus to compel a judge of the district court to vacate an order of injunction, if the district court was entirely without jurisdiction to make such order.
2. **District Courts: POWER TO ENJOIN JUSTICE'S JUDGMENT: QUERE.** Whether the district court has jurisdiction in an action brought solely for that purpose to enjoin the enforcement of a judgment of a justice of the peace in forcible entry and detainer on the ground that the justice had no jurisdiction because title to real estate was drawn in question is doubted, but not determined, the case being disposed of upon other grounds.
3. **Injunction: ENJOINING JUDGMENT OF FORCIBLE ENTRY AND DETAINER.** The district court has jurisdiction of an action to enforce the specific performance of a contract for the sale of real estate, and in such action may enjoin the prosecution of an action of forcible entry and detainer involving the same premises and pending upon appeal from justice court, and may enjoin the enforcement of the judgment of the justice while such appeal is pending.

ORIGINAL application for a writ of mandamus to compel respondent to vacate an injunction. *Dismissed.*

Harry L. Keefe and Hiram Chase, for relators.

Curtis L. Day and Brome, Ellick & Brome, contra.

SEDGWICK, J.

The plaintiffs applied to this court in its original jurisdiction for a writ of mandamus to require the defendant to vacate an order of injunction which he had issued as judge of the district court for Thurston county. The relators Amy M. Murphy, Gertrude Murphy and Alice Murphy were the owners of the land in dispute, and the relators Leisenberg and Litchie claimed an interest in the land under a lease. The Murphys contracted to sell the

land to one Harry D. Hancock, who made a substantial payment upon the contract of purchase and assumed the mortgage upon the land, agreeing by the contract to pay the balance of the purchase money when the abstract was furnished showing title. In the meantime creditors of the Murphys attached the land, and litigation arising upon this attachment appears to have prevented the completion of their contract with Hancock. Afterwards the Murphys made a contract of lease with these other relators, whereby they agreed to lease the land for the term of three years. Hancock claims the right of possession of the land under his contract, and made a contract with one Burcham, whereby he leased the land to Burcham. Burcham obtained possession of the land through an assignment of an old lease which was about to expire, and the relators Leisenberg and Litchie, claiming the right of possession under their lease with the Murphys, began an action of forcible entry and detainer against Burcham, Hancock and others in justice court, and obtained a judgment of restitution therein. The defendants in that action took an appeal to the district court, but the plaintiffs gave bond under the statute and demanded a writ of restitution to put them in possession, notwithstanding the appeal. Harry D. Hancock then began an action in the district court for a specific performance of his contract, making the Murphys defendants, and also these relators Leisenberg and Litchie and other parties claiming to be interested. In that action the injunction complained of was issued restraining the Murphys and Leisenberg and Litchie from proceeding further with their action of forcible entry and detainer, and from obtaining possession under their judgment therein. It appears from the return to the alternative writ of mandamus that since the writ was issued the Murphys have completed their contract with Hancock and have executed to him a deed of the land in controversy. They have filed herein a dismissal of this action so far as they are concerned. The relators Leisenberg and Litchie insist that they are en-

titled to a peremptory writ requiring the respondent as judge of the district court to vacate the order of injunction so far as it interferes with their obtaining possession of the premises under their judgment in forcible entry and detainer.

If the district court was entirely without jurisdiction to grant the injunction now complained of, these relators are entitled to the relief demanded. *State v. Graves*, 66 Neb. 17.

Two reasons are urged in the briefs for refusing this writ:

First. It is said that the record shows that in the action of forcible entry and detainer the title to real estate was drawn in question, and that therefore the justice of the peace had no jurisdiction and the judgment of restitution should for that reason be enjoined. The case of *Cobbey v. Wright*, 34 Neb. 771, is relied upon to support this contention. In that case a judgment had been entered against the plaintiff as garnishee, and he brought the action to restrain its enforcement. It appeared that the plaintiff had never been served as garnishee, and had no notice of the proceedings in which judgment was rendered against him. The court, therefore, which entered the judgment had no jurisdiction over the party against whom the judgment was rendered. In this case the justice court had jurisdiction over all the parties interested. It also had jurisdiction to determine the right of possession of the real estate. If the justice found from the evidence before him that the right of possession depended upon the title to the real estate, either legal or equitable, the law required him to enter judgment for the defendant. When the question was presented to him as to whether the right of possession would depend upon the title to real estate, he must determine that question from the evidence as he determined other questions of fact. If he determined that question incorrectly, it could be remedied by appeal. It is therefore by no means clear that, if the sole purpose of the injunction was to prevent the justice from making an

incorrect finding of fact and enforcing the judgment based upon such incorrect finding, the district court would have jurisdiction to grant such a writ. The determination of this case, however, does not depend upon the solving of that question.

Second. The petition in the injunction suit and the facts admitted in this record establish that the controversy between the parties was whether Mr. Hancock was entitled to a specific performance of his contract for the purchase of the land, and that the right of possession and the action of forcible entry and detainer in which that right of possession was in controversy were ancillary to and dependent upon the contract of purchase. There can be no doubt that Mr. Hancock was entitled to bring the action in the district court to enforce the specific performance of his contract, and, when that action was brought in a court of equity with general and complete jurisdiction, it would be the duty of that court to determine all ancillary matters affecting the result of that action or necessarily involved in it. If the action in equity resulted in determining that the plaintiff was entitled to a deed of the land which would carry the right of possession with it, it would be the duty of the court in determining the plaintiff's right in the land itself to also determine and enforce his right of possession. The district court was therefore not without jurisdiction to take full possession of all matters pertaining thereto.

It follows that the relators are not entitled to the peremptory writ, and the action is

DISMISSED.

STATE, EX REL. GEORGE C. CURYEA, APPELLANT, v. HARRY
E. WELLS, COUNTY CLERK, APPELLEE.

FILED NOVEMBER 1, 1912. No. 17,824.

1. **Elections: NOMINATIONS.** The legislature of this state in providing for the "closed primary" has adopted the policy of allowing each political party to select its own candidates.
2. ———: ———. Any one who has the statutory qualifications to fill an office may be a candidate for election to that office. If he affiliates with a political party he may become the candidate of that party, or he may become a candidate independently of all parties.
3. ———: ———. Under our primary law no political party can be compelled to present as its candidate at a general election one who does not affiliate with the party so presenting him as a candidate.
4. ———: ———: **FILLING VACANCIES.** If a political party at its primary makes no nomination of a candidate for election to an office, a vacancy has occurred, within the meaning of the statute, and the proper party committee may fill that vacancy.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Reversed with directions.*

A. S. Tibbets and Sterling F. Mutz, for appellant.

J. B. Strode, G. E. Hager and Whedon & Peterson, contra.

SEDGWICK, J.

At the primary election held in April, 1912, Carl O. Johnson was a candidate on the regular republican ticket for nomination as a candidate of that party at the ensuing general election for the office of county commissioner of Lancaster county. He made the necessary filings, declaring under oath that he affiliated with the republican party, and procured his name to be printed upon the regular republican ballot as the candidate of that

party. There was no candidate named on the printed ballot of the democratic primary for nomination to that office as a candidate of the democratic party. There was a blank space left upon the ballot of the democratic party for entering the name of a candidate of that party for nomination to that office. Mr. Johnson's name was written in 62 of the democratic ballots as the candidate of that party. He did not accept the nomination as the candidate of the democratic party, nor file any statement that he affiliated with that party. There is nothing in the record to show that there is any affiliation between the republican and democratic parties for the ensuing election. The proper committee of the democratic party, considering that a vacancy had occurred upon the ticket of that party, duly certified the nomination of the relator as the candidate of the democratic party. The respondent, who is county clerk of Lancaster county, refused to enter the name of the relator upon the official ballot for the ensuing election as the candidate of the democratic party for the office of county commissioner, and the relator brought this action of mandamus in the district court for Lancaster county to compel the respondent to place his name upon the official ballot as such candidate. The district court found in favor of the respondent and refused to issue a peremptory writ, and the relator has appealed to this court.

Our statute providing for primary elections recognizes the existence of organized political parties, and their right in general to regulate and control their own organizations for the purposes for which they are created. It imposes upon them certain restrictions as to the method of presenting their candidates to the voters at the general election. In the construction of the various statutes involved, we must consider both the right of the voter and the right of the candidate. Every voter has a right to be a candidate for a public office if he possesses the qualification which the law requires. If he possesses the qualifications required to fill the office, can he be the candidate

of more than one political party, and, if so, how and under what conditions? The statute provides when and how one may be a candidate of two or more political parties. If he cannot fill the requirement so as to be the candidate of any political party, he may still be a candidate at the general election by petition. The right of the voter to vote at the general election for whom he pleases cannot be limited. Whether the legislature can limit the voter in selecting a candidate for the various parties may be a debatable question. The important question here is as to the power of the legislature to protect the various political parties in their right to present candidates at the general election who affiliate with the party that presents them. And, if the legislature has such power, has it intended to require as a qualification of the candidate of a political party that he shall be in affiliation with that party? After trial of both methods the legislature has adopted what is called the closed primary. This contemplates that each political party shall have the right to select its own candidates, and shall have such protection as the law can afford in exercising that right. To this end it was necessary, and no doubt within the power of the legislature, to prescribe certain qualifications.

It is not necessary, in order to preserve the rights of the voter at the general election, that the name of a candidate should appear on the ballot more than once, nor is it necessary that he should be described on the ballot at the general election as a member of more than one political party; and the legislature, to carry out the idea of a closed primary, may well provide that the average voter shall not be deceived by a statement on the ballot at the general election that a candidate belongs to or affiliates with two antagonistic political parties, when those parties have not affiliated, and the candidate has declared under oath that he affiliates with one of them, and has refused and neglected to state that he affiliates with the other. In every instance in which the statute, as it now is, mentions the qualifications of a candidate of a political

party at the primary election, it prescribes affiliation with the party for which he proposes to be a candidate as a necessary qualification. All provisions of the open primary law which recognize the right to become a candidate of a political party without that qualification were repealed when the closed primary was provided for. Voters must declare their party affiliation when they register, and also when they vote at the primaries, and if their right to vote is challenged they must then declare their party affiliation. If they nominate candidates to be voted for at the primary election, they must declare that they affiliate with the party whose candidate they seek to nominate, and the law requires that a record be kept of the party affiliations of the voters. Ann. St. 1911, secs. 5855, 5866, 5878-5881. In all the cases provided in the statute, the candidate for nomination at the primaries must declare his party affiliation. The right to be a candidate at the general election and to have a place upon the printed ballot for that purpose is provided for. He may be such candidate independently of all parties; or, if he affiliates with any political party, he may have his name upon the ballot at the general election as the candidate of that party. If two or more political parties are affiliated for any general election, he may, of course, affiliate with both or all of them and become their candidate accordingly. But no political party can be compelled to put forward as its candidate one who does not affiliate with it. The voter at the general election may vote for whom he pleases, but may not be deceived by false labels. It surely is within the power of the legislature to prevent such deception, and we think it as clearly appears that it has intended to do so. It is not necessary to determine in this case whether a blank space should be left upon the primary ballot for inserting the name of the voter's choice as the candidate of his party. Upon this point the court is not entirely agreed. We are determining the qualifications for nominating as the candidate of a political party, and not the right to be a candidate for election to the

office. We conclude that one of the necessary qualifications for a candidate of a political party is affiliation with that party. If two political parties have affiliated for the general election, one may affiliate with both and be the candidate of both.

It is said that no vacancy had occurred upon the democratic ballot, and therefore the committee of that party was without power to appoint the relator. The statute provides: "Vacancies occurring upon any party ticket after the holding of any primary shall be filled by a majority vote of the party committee of the city, district, county or state, as the case may be, and a certificate of such nomination shall be filed as required by section 5776 of Cobbey's Annotated Statutes 1903." Ann. St. 1911, sec. 5888.

The statute of South Dakota provided that, "if for any reason *after a nomination as a party candidate for * * * state office has been made*, a vacancy shall occur," and the supreme court of that state in construing the statute gave great force to the words "after a nomination as a party candidate has been made." It was thought that the use of these words made clear "that the main purpose of the legislature in enacting the primary law was to take the making of all nominations out of the hands of conventions and political central committees, and to require that the people themselves, by their direct votes, should name party nominees; and that the only vacancies contemplated by the legislature, to be filled by conventions or central committees, are such as may occur *after the people themselves have made nominations*, and vacancies therein have occurred by death, resignation, or otherwise." *Stewart v. Polley*, 137 N. W. (S. Dak.) 565. It would seem that this construction of their statute is reasonable, as it is difficult to see what other purpose the legislature could have in inserting the words "after a nomination as a party candidate has been made." These words do not appear in our statute, and we must give the ordinary meaning to the word "occur." Webster's New International Dictionary

defines this word as follows: "To meet one's eye; to be found or met with; to present itself; to appear; to happen; to take place; as, if opportunity *occurs*; do not let it *occur* again." This seems to be plainly the sense in which the legislature used it in our statute. A vacancy on the ballot presented itself and appeared, and it was the province of the proper committee to fill such vacancy. If the only candidate voted for had died on primary day before the votes were cast, it will be conceded that a vacancy would occur. If after the primary there is a vacancy, it has "occurred," within the meaning of the statute.

The democratic committee requested Mr. Johnson to withdraw from the ticket. This, it is urged, estops the relator to dispute his qualifications to be the candidate of the party. In the letter asking Mr. Johnson to withdraw, it was stated that he was not nominated, and could not be the candidate of the democratic party. This letter must be taken rather as a demand that he withdraw his pretensions to the position than as an admission that he was duly nominated or was entitled to remain on the ballot of that party. It cannot be relied upon as an estoppel, even against the committee, much less against this relator.

For the reasons stated, the judgment of the district court is reversed and the cause remanded, with instructions to issue a peremptory writ as prayed.

REVERSED.

ROSE, J., dissenting.

As stated in the opinion of the majority, this is an application for a peremptory writ of mandamus to compel the county clerk of Lancaster county to place upon the official ballots for the election to be held November 5, 1912, the name of relator as the democratic candidate for county commissioner from the first district. After the primary election held April 12, 1912, the democratic county central committee selected relator as the democratic candidate for

the office named. He traces to that source his right to the relief demanded. He was not nominated at the primary. As a candidate for the same office the republicans regularly nominated at the primary Carl O. Johnson, who afterward accepted the republican nomination and made oath that he affiliated with the republican party. Among the reasons given by the county clerk for refusing to insert relator's name on the official ballots for the November election are the following: At the primary election in the first commissioner district the official ballots prepared for democratic electors did not contain the name of a democratic candidate for county commissioner. On the official, printed, democratic, primary ballots, however, a blank space had been left with a view to permitting each democrat to express his choice by writing in the blank the name of his preferred candidate. In the spaces thus appearing on the democratic ballots Carl O. Johnson received 62 votes, being a majority of those cast by democrats for the nomination of a candidate for county commissioner. The returns were duly canvassed and the canvassing board certified to the county clerk that Johnson was the democratic nominee. He has not declined the nomination. No objections thereto were ever filed in the county clerk's office. Johnson is therefore entitled to a place on the official ballots for the November election as the nominee of the democratic party. The trial court sustained the county clerk's defense as thus outlined and denied the writ. Relator appeals. In my view of the law the ruling of the district court is right.

Relator argued that there is no authority to nominate candidates by writing names in blank spaces on the primary ballots and that therefore Johnson is not the democratic nominee. The primary law does not forbid the making of nominations in that manner. While it does not in the body of the act itself contain in direct terms authority to vote in blank spaces, it provides: "The official primary ballot shall be printed substantially as is required by law for official ballots used at November elections,"

with an exception not material here. Comp. St. 1911, ch. 26, sec. 117*i*. The general election law to which reference is thus made provides: "Nothing in this act contained shall prevent any voter from writing on his ballot the name of any person for whom he desires to vote, for any office, and such vote shall be counted as if printed on the ballot, and marked by the voter." Comp. St. 1911, ch. 26, sec. 139. That part of the general election law relating to the preparation of the ballots for the November election further declares: "In each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote, and whose name is not printed upon the ballot." Comp. St. 1911, ch. 26, sec. 140.

The general election law requires instructions to voters as follows: "If you wish to vote for any person whose name is not printed on the ballot, write his name in full in the blank space on the ballot under the proper office you wish him to hold, and make a cross in the square opposite the written name." Comp. St. 1911, ch. 26, sec. 159, subd. 4.

The effect of the statutory references to these provisions of the general election law is to insert them in the primary law in so far as they are applicable thereto. *Shull v. Barton*, 58 Neb. 741; *State v. Junkin*, 87 Neb. 801. In preparing the ballots for the first commissioner district, the county clerk followed the foregoing provisions of statute. A ballot with a blank space for county commissioner was available to each democratic elector. Under a liberal construction of the primary law and of the constitutional provisions relating to elections as construed in *State v. Junkin*, 85 Neb. 1, the primary ballots prepared by the county clerk and the ballots cast by democrats in favor of Johnson were lawful. Exercising the right to participate at the primary in nominating a candidate to be voted for at the November election, 62 members of the democratic party voted for him. No other person received

so-many votes. There is no statute prohibiting those who affiliate with one party from nominating the candidate of another party. By voting for their choice in doing so they are not disfranchised at a primary election.

Relator further argued that there was a vacancy because Johnson failed to comply with statutory provisions requiring a candidate to accept a nomination under oath, to pay the filing fee, to declare his party affiliation and to make a statement that he would qualify and serve if elected. In this connection it is insisted that the vacancy was properly filled by the nomination of relator and that his name should be printed on the ballots for the November election. Those statutory provisions evidently apply to a candidate seeking a nomination by the political party with which he affiliates. Johnson, as a candidate of the republicans, complied with the provisions of statute. His nomination by the democratic party was voluntary. He did not decline it. As a republican candidate he paid his fee, declared his party affiliation, accepted the nomination and said he would qualify and serve if elected. That he should be required to repeat these acts in relation to a rival party and declare an affiliation having no existence, under penalty of defeating the democratic nomination lawfully made, was certainly not the intention of the legislature. The statutes should not be so construed. In this view of the law there was no vacancy when the democratic county central committee selected relator as a candidate for county commissioner instead of Johnson who had been regularly nominated at the primary by the votes of the democratic electors. In my judgment the effect of directing the county clerk to print relator's name on the official ballot is to defeat part of the action of the democratic primary which was held by democrats alone without interference from republicans, to create an artificial vacancy in the first commissioner district and to permit a political committee to set aside the regular action of the voters themselves.

GUST FREEBURG V. STATE OF NEBRASKA.

FILED NOVEMBER 1, 1912. ' No. 17,529.

1. **Drunkards: INSTRUCTION.** The instruction set out in the opinion is held to be an erroneous definition of drunkenness and a state of intoxication.
2. **Witnesses: PHYSICIANS: PRIVILEGED COMMUNICATIONS.** The doctor who was called to testify as a witness on behalf of the state, and who dressed the wounds of the defendant, was incompetent to testify to the defendant's condition, over the objection of the defendant that he was disqualified by reason of section 333 of the code.

ERROR to the district court for Phelps county: HARRY S. DUNGAN, JUDGE. *Reversed.*

James I. Rhea, for plaintiff in error.

A. J. Shafer, *contra*.

HAMER, J.

The plaintiff in error, Gust Freeburg, hereafter designated as the defendant, was complained against in the police court of the city of Holdrege, July 5, 1911, and was charged with the violation of an alleged ordinance in that city on July 4, 1911. The plaintiff charged that the said Gust Freeburg, "on or about the 4th day of July, A. D. 1911, in the county last named (Phelps), and within the corporate limits of the city of Holdrege, then and there being, did then and there unlawfully become drunk, and was then and there found in a state of intoxication and drunkenness, contrary to section 44 of ordinance 45, of the Compiled and Revised Ordinances of the city of Holdrege." The defendant was found guilty in the police court, and sentenced to pay a fine of \$10 and costs. He appealed to the district court, and was there convicted and sentenced to pay a fine of \$1 and costs. He brings the case here for review.

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Upon that point there seems to be a conflict of evidence, but there is no conflict touching the fact that the defendant was going home with a Mr. Levine, and the city marshal started to arrest him, and the defendant and Levine begged him not to make the arrest. The city marshal struck the defendant over the head with his revolver, but claims in justification that the defendant and Levine objected to the arrest and finally resisted. At the time this happened they were near Levine's tailor shop, and Levine said he wanted to go in his shop to get his coat, and then they would go home together. Freeburg and Levine denied making any resistance to the arrest, and it does not appear Freeburg was in any way offensive in his conduct.

Dr. S. F. Sanders was called by the county attorney, and testified as a witness on behalf of the state, and over the objection of counsel for the defendant. He testified that he was a practicing physician in the city of Holdrege, and that on the afternoon or evening of July 4, 1911, he was called upon to dress certain wounds from which the defendant was suffering; that he found the defendant at the tailor shop of Mr. Levine, and had him removed to his (Sanders') office, which was near by, and where he treated him for the injuries which he had received. He gave as a reason for believing that the defendant was intoxicated that his breath smelled of beer, and immediately after his wounds were dressed the defendant said, "I guess it is all right." The defendant had also said something else which the witness testified he was unable to remember. The fact that Sanders was a doctor, and that he had been called to attend the defendant, and testified to his opinion concerning the condition of the accused as to intoxication, would give his testimony great weight with the jury, because of the confidential relation which he sustained to the defendant, and because as a doctor his knowledge would be supposed to be superior to that of other men.

Section 333 of the code of civil procedure provides: "No practicing attorney, counselor, physician, surgeon,

minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

The foregoing section would seem to justify the exclusion of the testimony of Dr. Sanders. We think that his testimony was clearly prejudicial. *Bryant v. Modern Woodmen of America*, 86 Neb. 372; *Sovereign Camp, W. O. W., v. Grandon*, 64 Neb. 39; *Smart v. Kansas City*, 208 Mo. 162; *Gartside v. Connecticut Mutual Life Ins. Co.*, 76 Mo. 446, 43 Am. Rep. 765; *Masonic Mutual Benefit Ass'n v. Beck*, 77 Ind. 203; *Heuston v. Simpson*, 115 Ind. 62; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274.

In the last named case the doctor was asked, "What opinion did you form, based on the general sight of the man, before you made an examination, or before you had any conversation with him?" The court held that the question was properly excluded as privileged within the statute. In the opinion it is said: "We have distinctly held in such a case that the communication to the physician's sense of sight is within the statute, and as much so as if it had been oral and reached his ear."

The Missouri statute declares a physician or surgeon incompetent to testify "concerning any information which he may have acquired, * * * and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." Rev. St. Mo. 1899, sec. 4659. The Missouri supreme court on page 183 of the opinion in *Smart v. Kansas City*, *supra*, said: "The meaning of this section is not veiled in doubt. It disqualifies the physician and surgeon from testifying to any information acquired by them while attending their patients in a professional capacity. The wisdom of such a law is addressed to the legislative branch of the government, and not to the judiciary; the latter has to deal with its meaning, and not the policy of the statute. . That policy

is not only well grounded in this state, but is firmly rooted in the jurisprudence of a majority of the states and territories of the Union."

Counsel complain of the ninth instruction. It reads: "The court instructs you, gentlemen of the jury, that where a person is under the influence of intoxicating liquor to such an extent that it affects him mentally or physically, and that such effect resulting from the use of intoxicating liquor is visible to one observing such person, then as a matter of law said person would be in a drunken or intoxicated condition, and it is for you to determine from the evidence whether the defendant in this case was in a drunken or intoxicated condition at the time of his arrest, bearing in mind that the burden of proof is upon the state to establish such fact of drunkenness or intoxication of the defendant by the evidence beyond a reasonable doubt."

In our opinion this instruction is clearly erroneous and prejudicial. It makes the mere fact that the effect resulting from the use of intoxicating liquor is *visible* sufficient evidence that the person is drunk. To illustrate: The action of the person is excluded from the consideration of the jury. The condition of the person is also by this instruction excluded from the consideration of the jury. The only thing submitted to the jury is whether the effect "is visible."

In *Standard Life & Accident Ins. Co. v. Jones*, 94 Ala. 434, 10 So. 530, the question of what constitutes intoxication is discussed, and the court say: "To be under the influence of whiskey is not necessarily to be intoxicated. One may well be said to be under the influence of strong drink when he is to *any extent* affected by it—when he feels it; and this condition may result from potations so small as not to impair any mental or physical faculty, and when the passions are not visibly excited, nor the judgment or any physical function impaired. This is very far short of 'intoxication,' which is the synonym of 'inebriety,' 'drunkenness,' implying or evidenced by undue or abnormal excitation of the passions or feelings, or the im-

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pairment of the capacity to think and act correctly and efficiently." "The word 'intoxicated' is synonymous with 'drunk,' and in the Standard Dictionary 'drunk' is defined as under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and commonly to evince a disposition to violence, quarrelsomeness and bestiality." 4 Words and Phrases, 3734. "The word 'intoxication' means an abnormal mental or physical condition due to the influence of alcoholic liquors, a visible excitation of the passions, and impairment of the judgment, or a derangement or impairment of physical functions or energies. This implies a condition which would not result from the reasonable, ordinary, and moderate use of the most intoxicating liquors." 4 Words and Phrases, 3735. *Wadsworth v. Dunnam* 98 Ala. 610, 13 So. 597. "Intoxication" is a word merely synonymous with "inebriety" or "inebriation," and is expressive of that state or condition which inevitably follows from taking into the body by swallowing or drinking excessive quantities of intoxicating liquors. *Commonwealth v. Whitney*, 65 Mass. 477. The instruction set out was erroneous and prejudicial.

The judgment of the district court is

REVERSED.

SANDWICH MANUFACTURING COMPANY ET AL., APPELLANTS,
v. HEINRICH B. HUCKFELDT, APPELLEE.

FILED NOVEMBER 13, 1912. No. 16,782.

Judgment: REVIVOR: PLEA OF PAYMENT: EVIDENCE. Proceedings to revive a dormant judgment. A transcript of the judgment was filed in the office of the clerk of the district court November 3, 1884. December 29, 1884, defendant conveyed certain land to plaintiff by deed containing the usual covenants of warranty, and upon which the judgment was a lien. Plaintiff paid the judgment August 6, 1885, when it was assigned to his agent, who

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subsequently assigned to him. No effort was made to collect, perpetuate, or revive the judgment until 1907. Upon an application to revive the judgment, defendant pleaded payment, and testified that at the time of the sale of the real estate \$1,000 of the purchase price of the land was withheld by plaintiff, with defendant's consent, with which to pay the judgment liens. There was a general finding in favor of defendant by the trial court. The sum of \$1,000 was more than sufficient to cancel the judgment liens. The judgment docket contains no record of the satisfaction of the judgment. *Held*, That, if such sum was retained by plaintiff for that purpose, it would be a complete defense to his action to revive, without reference to whether the money was applied by him to the payment or not, which was a question of fact to be decided by the trial court. The finding being in favor of defendant on conflicting evidence, but which is sufficient to support the conclusion reached, will not be disturbed.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed*.

John C. Stevens and J. A. Gardiner, for appellants.

W. F. Button and John Snider, *contra*.

REESE, C. J.

On the 27th day of October, 1884, the Sandwich Manufacturing Company recovered a judgment against appellee, Huckfeldt, for the sum of \$102.20 and costs of suit taxed at \$4.90. A transcript was filed in the office of the clerk of the district court on the 3d day of November, 1884. An assignment of the judgment to R. S. Langley was made August 6, 1886, and on the 6th day of November, 1886, Langley assigned the same to William Gardiner, who on the 12th day of March, 1910, assigned to J. A. Gardiner, who was substituted as appellant herein January 19, 1911. No execution was issued upon the judgment, nor was any other effort made to collect it until the 2d day of October, 1907, when, the judgment being dormant, a proceeding was instituted in the district court for its revival in the name of William Gardiner as the owner thereof. In the course of time, and on the 11th day of May, 1908, an an-

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swer was filed, in which the sufficiency of the petition, or application, was denied and called in question. The rendition of the judgment, the filing of the transcript, the absence of issuance of execution, and the dormancy of the judgment were admitted. All other allegations were denied. It was alleged that after said judgment was rendered, but before the institution of the revivor proceedings, defendant satisfied and discharged the judgment by payment in full. It was further alleged that the judgment was presumed to have been paid "on account of the lapse of time." A reply denying the payment was filed. A number of dilatory motions and stipulations were filed, but none of which need be noticed at this time.

It is said, and so appears, that on the 29th day of December, 1884, defendant sold and conveyed certain land in Adams county to William Gardiner, executing to him a warranty deed, subject to a mortgage of \$1,800, but otherwise containing full covenants of warranty. The transcript of the judgment being then on file, it was probably a lien on the land. On the 8th day of June, 1885, the judgment plaintiff wrote Mr. Gardiner calling his attention to the fact and expressing a purpose to hold the land liable for its payment. He then paid off the judgment, and it was assigned to his agent by Ballinger & Cherry, who executed the assignment as attorneys for Sandwich Manufacturing Company. The agent afterward assigned to William Gardiner. Prior to the trial, some question having arisen as to the authority of the attorneys to assign the judgment, a paper denominated "Disclaimer and Confirmation of Assignment" was, by leave of court, filed by the Sandwich Manufacturing Company, in which, among other recitals, the assignment of the judgment "by Ballinger & Cherry, its attorneys," was approved and confirmed. This paper was in the nature of an intervention. It was subsequently stricken from the files over the exception of plaintiff, and of which he now complains. As the only matter of importance contained in the paper was the approval of the assignment by Bal-

linger & Cherry, and as the authority to make the assignment would be subject to proof upon the trial by competent evidence, we are unable to see where the court erred in the action complained of. But, even were the ruling erroneous, it could work no prejudice, as the question of authority or subsequent ratification was not thereby foreclosed. The cause was tried to the court, the result being a general finding in favor of the defendant and a dismissal of the proceedings. Plaintiffs appeal.

A number of questions are presented in the briefs and were argued at the bar, which, in the view we take of the case, it is not necessary to decide. The answer pleads payment, and defendant testified that at the time of the closing of the sale of the real estate, in the state of Illinois, the sum of \$1,000 was deducted from the purchase price of the land by plaintiff Gardiner, and was to be, and he supposed was, sent to the clerk of the district court for the purpose of satisfying any judgments which might be a lien or cloud upon the title, and that he afterward drew out of the clerk's hands the overplus. As touching one view of the case, we are deprived of the testimony of the former clerk, as he is shown to be deceased. The judgments were not satisfied upon the record, nor is there any entry showing the receipt of the \$1,000 by the then clerk. But there is another view of the case, which was probably adopted by the district court. This effort to revive the judgment was, in reality, instituted by and on behalf of William Gardiner, the person who purchased the land from defendant. If defendant paid or allowed plaintiff the \$1,000, as testified to, for the purpose of paying the judgment, it could make no legal difference whether plaintiff remitted the money to the clerk or not, for that, as between them, would so far work a cancelation of the judgment as to prevent its revivor at the suit of plaintiff. It is true that the evidence as to that transaction is conflicting, and this is not surprising when we remember that it occurred in 1884, and this proceeding was instituted in 1907, and the trial was had in January, 1910. While a fairly rea-

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sonable excuse is given for the failure to take any steps to perpetuate the life of the judgment by the issuance of execution, or to revive it for the 23 intervening years, yet that fact, coupled with the positive testimony of defendant, and the presumption of payment, probably satisfied the mind of the trial court that the money was so paid or withheld, and upon that issue the decision was made; and we do not feel justified, in view of the evidence and all the circumstances, in reversing such finding.

The judgment of the district court is therefore

AFFIRMED.

FAWCETT, J., not sitting.

LETTON, J., concurring in result only.

I am unable to take the same view as to the evidence as is taken in the majority opinion, but concur in the result for other reasons.

**WILLIAM E. WALLACE, APPELLEE, v. A. W. COX ET AL.,
APPELLANTS.**

FILED NOVEMBER 13, 1912. No. 17,068.

1. **Replevin: JUDGMENT FOR DEFENDANT: RETURN OF PROPERTY.** Where, in an action of replevin, the property in dispute is delivered to the plaintiff upon the execution of a proper bond, and the trial results in a judgment in favor of the defendant for a return of the property to him, it is the duty of the plaintiff to return the possession of the replevied property to the defendant within a reasonable time in substantially the same condition as when taken, without deterioration in value.
2. ———: ———: ———: **DAMAGES.** In case the replevied property is not redelivered or tendered back within a reasonable time, and, when tendered, is greatly diminished in value by use while in the possession of plaintiff, the defendant may refuse to accept or receive the property, and bring suit on the replevin bond. The measure of damages will be the value of the replevied property as found and adjudged in the replevin action, plus the costs therein, with interest.

APPEAL from the district court for Webster county:
HARRY S. DUNGAN, JUDGE. *Affirmed on condition.*

Bernard McNeny and E. U. Overman, for appellants.

L. H. Blackledge, contra.

REESE, C. J.

This action was instituted in the district court for Webster county. It is alleged in the petition that on the 17th day of July, 1909, the Clark Implement Company, a corporation, commenced an action in that court against the plaintiff to recover the possession of certain specific personal property, which is shown to be a threshing machine and traction engine; that an order of delivery was issued, the property of the value of \$2,000 taken, when a replevin bond in the sum of \$4,000 was duly executed by the plaintiff in the action; that upon the trial of said cause such proceedings were had as resulted in a finding in favor of the plaintiff in this action, assessing his damages at the sum of \$404.50; that the right of property and of possession were in this plaintiff, which was of the value of \$2,000; that judgment was rendered in favor of this plaintiff for the said sum of \$404.50, with costs taxed at \$121.60, and for a return of the property, or, in lieu of such return, the value thereof, to wit, \$2,000; that "defendant has not returned nor offered to return said property in the same, or substantially the same, condition in which it was taken, and no part of said judgment has been paid;" that "an execution was issued * * * on said judgment in favor of this plaintiff, which was returned wholly unsatisfied." The action is founded on the replevin bond to recover the sum of \$2,526.10, being the value of the property, damages, interest, and the costs of the former suit.

The defendants Cox and Boyd answered, admitting the averments of the petition as to the prior suit and the judgment rendered therein, but allege that, after the termina-

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tion of said action, the property involved in the suit was all returned to plaintiff, and in better condition than when taken under the writ of replevin. All unadmitted allegations are denied. Defendant the Clark Implement Company filed its separate answer, but which is substantially the same as that filed by Cox and Boyd. The replies are general denials. The cause was tried to a jury; the result being a verdict and judgment in favor of plaintiff for the sum of \$2,686.33. A motion for a new trial having been made, overruled, and judgment entered, defendants appeal.

Some objection is made to the above quoted part of the petition, and it is contended that the use of the word "substantially" so militates against the other averments as to render them ineffectual as an allegation that the property had not been returned. As we view the case, the objection is not of much importance, as there is no contention that the property was not returned. While it is admitted by plaintiff that the property was returned, it is insisted that it was not returned in the same condition as when taken from him under the writ, and that he refused to accept it. The theory upon which the case was tried by plaintiff was that the property was not returned within a reasonable time, and, when it was returned, it was in so badly damaged a condition as to relieve plaintiff from the duty of accepting it, and gave him the option of rejecting it and suing upon the bond for the value as found and adjudged on the trial of the replevin suit. It is contended by defendants that plaintiff has no option, but must receive the property, and could then sue for the difference in its value between what it was when taken and at the time of the return. To the extent of submitting to the jury the question of the condition of the property when returned, the court adopted plaintiff's view of the law. If the court was right in this, the language of the petition to which objection is made becomes unimportant.

The trial of the replevin case was had in November, 1909, the final judgment being rendered on the 1st day of December of that year. The action was commenced in

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July, 1909, the replevin bond bearing date the 19th, at which time the property was delivered to defendants. Defendants returned the property to plaintiff on or about the 25th of February, 1910, and, when examined by plaintiff and others called by him for that purpose, he gave to defendants a notice in writing that he would not accept it. This notice is dated the 26th of February, 1910, and refers to the tender of return having been made the day before. While there is a sharp conflict in the evidence as to the condition of both the separator and engine at the time the return was tendered to plaintiff, as compared with their condition when taken under the order of replevin, there is sufficient to sustain the finding of the jury that both were very materially injured by wear and breakage, and that their value was reduced probably one-half by reason of their impaired condition. So far as is shown by the record, they had been in the possession of defendants from the 19th day of July, 1909, until the 25th day of February, 1910, and there seems to be no doubt that they had been put to use during the threshing season while in defendants' possession.

It is fundamental that, where a judgment in an action of replevin is against the plaintiff, it is his duty to return the property to the defendant within a reasonable time in substantially as good condition as when taken, and this would satisfy the judgment in so far as the return had been ordered if the property was accepted by the defendant, but it would not cancel the money judgment for damages, nor would it deprive the defendant of his action for depreciation of the value of the property while out of his possession. While this is all true, yet the duty of returning the property within a reasonable time and in substantially an unimpaired condition should be performed, and it does not lie with the plaintiff in the action, after long delay, to return property badly damaged by use or otherwise, compel the defendant to accept it, and then litigate the question of damages in another action. Our statute does not provide that the property shall be returned

in the same condition as when taken, as in some states, but the holding is practically uniform that such a statute is not necessary, as we have in effect held. Some of the authorities sustaining these views we here cite, but without quoting from any: *Eickhoff v. Eikenbary*, 52 Neb. 332; *Berry v. Hoeffner*, 56 Me. 170; *Parker v. Simonds*, 8 Met. (Mass.) 205; *Capital Lumbering Co. v. Learned*, 36 Or. 544; *Childs v. Wilkinson*, 15 Tex. Civ. App. 687; *Fair v. Citizens State Bank*, 69 Kan. 353; *Douglass v. Douglass*, 21 Wall. (U. S.) 98; *Pittsburgh Nat. Bank of Commerce v. Hall*, 107 Pa. St. 583; 34 Cyc. 1551, 1552; Cobbey, Replevin (2d ed.) sec. 1182; Wells, Replevin (2d ed.) sec. 422; Shinn, Replevin, sec. 679. In some of the cases cited, and in the citations from Wells and Shinn, it is said that the party returning may do so, even if the property is depreciated in value, and leave the one to whom the return is made to his action on the bond for the deficiency, but we apprehend that in order to secure this right, if it may be so secured, the return must be had within a reasonable time, which would be soon after the judgment. In this case the offered return could scarcely be said to be within a reasonable time.

Where the property is not returned, the plaintiff's measure of damages is its value when taken under the writ, with legal interest thereon from the date of the wrongful taking by the plaintiff in replevin, but, in that event, the successful defendant must be content with a recovery of the value at the time it was taken from him, with legal interest to the time of the trial, and he can have nothing further in the way of damages.

In *Romberg v. Hughes*, 18 Neb. 579, it is said, the late Judge MAXWELL writing the opinion of the court: "It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. The rule allowing the value of the use is peculiar to replevin, and grows out of the fact that the party to whom the property is awarded seeks to recover the property itself, and not its value. In such

case, when the property is returned, the party to whom the return is made is entitled to the damages awarded for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking." See, also, *Aultman, Miller & Co. v. Stichler*, 21 Neb. 72.

Since the jury in the replevin suit found the value of the property in dispute to be \$2,000, and upon which the judgment was rendered, and the same was not appealed from, that must be the limit of plaintiff's recovery, with legal interest from the time the property was taken under the writ.

The judgment of the district court will therefore be reversed and the cause remanded, unless the plaintiff within 60 days from the rendition of the order hereby made remits from the judgment the sum of \$404.50 as of the date of the judgment in this case. If such remittitur is filed, the judgment of the district court for the sum of \$2,121.60, with interest at 7 per cent. on \$2,000 from the 19th day of July, 1909, will be affirmed, but at the costs of the appellee. The effect of the affirmance of the judgment in this case, as modified, will be a satisfaction of the judgment of December 2, 1909.

AFFIRMED.

SEDGWICK, J., dissenting.

This plaintiff refused to receive a return of the property replevied. That refusal is the cause of this lawsuit. Was he justified in law in so refusing? That is the question to be answered in the opinion.

1. I think the opinion construes the statute incorrectly, as hereinafter stated; but, even as the law is stated in the opinion, the petition and the evidence both failed to make a case for the plaintiff, because they did not allege or prove that there is any other or different damage to the property than that which the jury allowed in their ver-

dict in the replevin action. The allegations of the petition in this regard are only: (a) That in the replevin action "judgment was rendered for the defendant in the sum of \$404.50 damages." (b) That the property was not returned "in the same, or substantially the same, condition in which it was taken." This clearly does not state a cause of action; that is, it does not state any reason for refusing a return of the property. The allegations clearly amount to saying that, because of damages which the jury in the replevin action allowed, the property was not in the same, or substantially the same, condition in which it was taken. This is as plain as though the petition had alleged that the defendant recovered \$404.50 damages, and therefore his property was not in the same condition as when it was taken. The evidence is substantially the same as the petition, and therefore there is no occasion for any liberal construction of the petition. The evidence and the rulings of the trial court show plainly that the court tried the case upon the incorrect theory that this plaintiff would be justified in refusing to receive a return of the property if he could show that the property was not in the same condition when it was returned as it was when it was replevied, without regard to the fact that he had been allowed \$404.50 because of the change in the condition of the property.

2. Section 191 of the code provides that when the property replevied has been delivered to the plaintiff, and the jury finds for the defendant, "they shall assess such damages as they think right and proper for the defendant." Similar words, as to the damages to be allowed, are also found in section 190 of the code. Section 191a of the code, which was enacted in 1873, uses somewhat different phraseology, but there is no reason for supposing that the legislature intended thereby to change the law in regard to the measure of damages. If the property replevied is delivered to the plaintiff and the plaintiff has damaged the property in any way while so in his possession, there seems to be no doubt that the defendant may upon the

trial of the replevin action recover such damages. If the plaintiff has a judgment against him for a return of the property, he must pay the damages which the jury has awarded against him for injuries to the property while in his possession. If he fails to return the property at once, and retains it, and the property is damaged in his possession while he retains it after the judgment in replevin, a different question is presented, which is not involved in this case. In this case the plaintiff retained the property from the time it was replevied in July until the trial in the following December, and upon the trial the jury assessed damages against him in the sum of \$404.50. It is stated in the verdict that this is for the use of the property while in the possession of the defendant. The defendant in replevin, who is now the plaintiff in this action, is allowed to recover these damages, and also the value of the property as it was, after it had been so damaged, and this appears to be wholly upon the ground that the plaintiff in the replevin action returned the property in a damaged condition; so it appears that the property has been damaged; that the jury has fixed the amount of the damages; the plaintiff in replevin is compelled to pay it, and was required, and, of course, was allowed, to return the property as it was, after the damages were incurred which he is required to pay. The opinion says that, "while it is admitted by plaintiff that the property was returned, it is insisted that it was not returned in the same condition as when taken from him under the writ," but, if the property is damaged while the replevin action is pending and he recovers those damages in the replevin action, he cannot refuse to receive the property because of those damages. The opinion cites numerous authorities, some of which have no relation to the law point discussed in the opinion, and others are said in the opinion itself to hold a contrary doctrine. It fails to cite *Teel v. Miles*, 51 Neb. 542, and other decisions of this court which are flatly overruled by this opinion.

3. Again, it is said in the opinion that the petition al-

leged: "Defendant has not returned nor offered to return said property in the same, or substantially the same, condition in which it was taken." The allegation is subject to criticism for duplicity. It is neither a direct allegation that the property was not returned, nor is it a direct allegation that when returned it was not in the same condition as when it was taken; and, if it could be construed as an allegation that it was not in the same condition as when taken, that allegation would be wholly immaterial, since it is conceded by everybody, and so found by the jury in the replevin action, that after it was taken it was damaged in the sum of \$404.50, and that the plaintiff in the replevin action must pay that amount to the defendant therein and return the property as it was at the time of the trial in the replevin action. In the view of the law stated (I think incorrectly) in the opinion, it should be shown at least that the property was damaged more than the amount which the plaintiff in that action was required to pay him on account of the damage, and should show that that damage was not included in the verdict of the jury in the replevin action.

4. It is said in the opinion that "the offered return could scarcely be said to be within a reasonable time." There is no allegation in the petition that the return was unreasonably delayed, and there is no attempt in the evidence to sustain the action upon that ground. It is not mentioned in the brief. The judgment was entered in December, and the property was returned in the following February, less than two months. The defendant in this action testified that the roads were bad at that season of the year, and that it was returned as soon as the roads were passable. The plaintiff also testified that the property was returned as soon as the roads were good, and never at any time made any objection on account of the delay.

I think the judgment of the district court should be reversed.

MILTON W. ENSIGN, APPELLEE, V. CITIZENS INTERURBAN RAILWAY COMPANY, APPELLANT; LAURA T. FUNK ET AL., APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,829.

1. **Vendor and Purchaser: NOTICE.** A purchaser of a tract of land situated near a projected and surveyed line of street railway and boulevard is not thereby charged with notice that by a subsequent change of such projected route a part of his purchase may be taken for such public improvement.
2. **Eminent Domain: REMEDIES.** If by a subsequent change of location a part of his land is so taken, and he, without objection, acquiesces in such appropriation, he will not be permitted to regain possession by an action in ejectment, but under proper pleadings in such a suit may recover the value of his land so taken.
3. **Contracts: RESCISSION.** Where a suburban landowner, in consideration of the location, construction and dedication of an interurban railway and boulevard across his premises, enters into a written contract to convey to the street railway company a part of his land for right of way purposes, and thereafter seeks to rescind his contract on the ground of fraud or mistake, he must act promptly and make known his intention to rescind upon his discovery of the facts.
1. **Specific Performance: CONTRACT FOR RIGHT OF WAY.** If, with full knowledge of all of the facts upon which he relies for a rescission of his contract, he remains silent and acquiesces in the construction of the improvement and the dedication of the boulevard to the public use, a court of equity may require him to specifically perform his contract.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed as to appellee Ensign and reversed with directions as to appellees Funk.*

E. J. Hainer, for appellant.

Shepherd & Ripley, Greene & Greene and George A. Adams, contra.

BARNES, J.

This action was brought by Milton W. Ensign as a suit in ejectment to recover the possession of a strip of land which is covered by a boulevard and the right of way of the defendant, the Citizens Interurban Railway Company. The defendant by its answer alleged, in substance, that on or about the 1st day of March, 1908, one Laura T. Funk, then the owner of the land in question, described as lots 48 and 52 in the northeast quarter of section 6, township 9, range 7, being desirous of obtaining a boulevard 150 feet in width and a line of street railway from the corner of Twenty-sixth and South streets in the city of Lincoln to the village of College View, over and across her said premises, made an agreement with the defendant company for such boulevard to be constructed and dedicated as a public highway, and agreed to convey to the said company or its assigns by good and sufficient special warranty deed, from said lots 48 and 52, $7\frac{1}{2}$ acres, including the right of way for its interurban railway track and boulevard; that the defendant company, in good faith, relied upon her agreement, and, in pursuance of the terms and conditions thereof, did proceed to obtain the right of way for the boulevard, and caused preliminary surveys to be made of said line or route across her land and the lands of others, and thereafter proceeded diligently with the locating, laying out, establishing, building and constructing said line, and thereby performed its part of the agreement; that plaintiff Ensign had full notice and knowledge of the contract between Mrs. Funk and the company, and was induced to purchase the premises in question by reason thereof; that the contract with Mrs. Funk rested in parol until about May 1, when the same was reduced to writing and duly executed. The defendant company prayed that Laura T. Funk and Ancil L. Funk, her husband, be required by the decree of the court to convey to the company the premises described in the agreement above mentioned; that any right, title or claim of the plaintiff Ensign in and

to any part of the public road, boulevard or strip of land 150 feet in width be declared to be subject, junior and inferior to the rights of the defendant and the public.

After the defendant company filed its answer, Laura T. Funk and her husband, Ancil L. Funk, were made parties defendant, each of whom filed separate cross-answers. In the answer of Laura T. Funk it was alleged, in substance, that the agreement set forth in the answer and cross-petition of the defendant company was procured from her by fraud and misrepresentation in this: That some months prior to May 1, 1908, she agreed, under certain conditions, to dedicate to the public and the defendant company the right of way for a boulevard and electric car line 150 feet wide, running in an easterly and westerly direction through the south half of the west 10 acres of lot 52 to the village of College View, Nebraska; that all the negotiations with reference to the agreement were conducted on her part by Ancil L. Funk, who in that particular matter acted as her agent; that she was ignorant of all matters and facts connected with the transaction, save only that she signed or authorized said Ancil L. Funk to sign the particular agreement referred to at his request; that on or about May 1, 1908, the defendant company, at a time when Ancil L. Funk was away from home, and when it was impossible for her to communicate with him, came to her at her home in the city of Lincoln with a document, probably the original contract attached to the cross-petition of defendant company, and falsely and fraudulently represented to her that said contract was, to all intents and purposes, identical with the contract theretofore made between her and the defendant company; that it referred to exactly the same land described in said contract; that it provided for the conveyance of said land to the same party described therein, and that the only difference between it and the original agreement was in matter of form; that the representations so made to her were false and untrue; that the contract was not, to all intents and purposes, identical with the agreement there-

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tofore made; that it referred to different land entirely from that described in the former agreement, and provided for the conveyance to a different party from that described therein, and differed from the contract in all material respects in substance and intent; that, relying upon said representations, she executed and delivered said last named contract to the defendant company.

The reply of plaintiff, Ensign, was in the nature of a denial, and concluded with a prayer that the court determine the amount of damages he had sustained, in case it was found that he was entitled to recover. The defendant company replied to the answer and cross-bill of Laura T. Funk by a general denial. There was a trial to the court without the intervention of a jury, and a finding for plaintiff Ensign, and a judgment in his favor against the defendant company for \$350. The court also found that the contract executed between the company and the Funks was obtained by fraud or mistake, and denied any relief to the defendant company. From that judgment the railway company has brought the case to this court on appeal.

From the foregoing it appears that the issues to be determined between the plaintiff, Ensign, and the defendant railway company are: First. Did the plaintiff, at the time of the purchase of his tract of land from the Funks, have notice of such circumstances as to put him on his guard, and call for an inquiry with respect as to where the company had a right to permanently locate its line upon and across the premises in question? Second. If he did not have such notice, and purchased his land in good faith, what is the reasonable value of the land taken by the company, and which he seeks in this action to recover? The issues between the defendant railway company and Laura T. Funk are: First. Was the contract sued upon obtained from her by fraud and misrepresentation? Second. Can Laura T. Funk rescind the contract executed between her and the defendant railway company on account of fraud or mistake, without having given

prompt notice of her intention to rescind it upon the discovery of the facts in relation thereto? Third. Can Laura T. Funk rescind the contract on account of fraud or mistake, after having full notice of the facts, and permitting the defendant company to expend large sums of money in locating, building, constructing, equipping and putting in operation the railway and boulevard in question?

In considering the questions at issue between the plaintiff, Ensign, and the defendant railway company, it appears that when Ensign purchased his tract of land from Mrs. Funk in April, 1908, there had been a preliminary survey of the proposed line of street railway and boulevard; that its location, as evidenced by the stakes then upon the ground, indicated that no part of the Ensign purchase would be taken for either the railway or boulevard. It appears that he obtained his deed from the Funks on April 20, 1908, and immediately filed it for record in the office of the register of deeds; that while he was absent from the state some time in the latter part of August, 1908, the line was changed; that the construction proceeded on such new line, and when completed there was taken from Ensign's tract, without his consent, about three-tenths of an acre thereof. We are of opinion that he was not required by anything contained in this record to presume or expect that when the road was constructed any part of his land would be taken for that purpose. Therefore, the finding of the district court upon that point should be sustained.

We are also of opinion that under all the circumstances, as shown by the record, Ensign should not be permitted to oust the defendant company from its possession of that part of his land actually taken and occupied for the railway and the boulevard in question, but is entitled to recover the value of his land so taken. We also find sufficient evidence in the record to sustain the judgment of \$350 awarded him by the trial court; and the decree appealed from, so far as it relates to plaintiff, Ensign, is affirmed.

Upon the issues between the defendant railway company and the cross-petitioners, Laura T. and Ancil L. Funk, we find that the evidence shows, without serious dispute, that the Funks entered into a contract with the defendant railway company, which was afterwards reduced to writing, and signed by both parties, as alleged in defendant's answer and cross-petition, by which, in consideration of the construction and operation of an electric street railway and a boulevard from Twenty-sixth and South streets in the city of Lincoln to Union College in the village of College View, they agreed to convey to the defendant railway company $7\frac{1}{2}$ acres of land, including a strip of 150 feet in width for the right of way of the street railway and boulevard out of lots 48 and 52, situated in the northeast quarter of section 6, township 9, range 7, in Lancaster county, Nebraska; that the written contract was not obtained by fraud, misrepresentation or mistake; that the claim that the written contract provided for a route different from the one described in the original agreement is without foundation; that the street railway and boulevard run through said tracts of land in an easterly and westerly direction, as described in their original contract; that the defendant railway has complied with and performed all of the conditions, stipulations and agreements contained in the written contract on its part; that the Funks have obtained the benefits expected therefrom, and at all times have had full knowledge of any and all changes of location, including the one finally adopted for the construction of the street railway and boulevard; that during the progress of such construction they demanded from the officers of the street railway company payment for the corn growing on the proposed right of way, and in that behalf finally received therefor the sum of \$100; that they made no claim of fraud, misrepresentation or mistake, and gave no notice to the railway company of any desire on their part to rescind their contract until long after the street railway was constructed and in operation, and the boulevard was

completed and dedicated to the public as a highway. It follows that, if the Funks were induced to sign the same through fraud or mistake, by their subsequent conduct they are now estopped to rescind it.

In the case of *Gallagher v. O'Neill*, 78 Neb. 671, the following language found in *Booth v. Ryan*, 31 Wis. 45, was quoted with approval: "It is a principle which has been too long and too thoroughly established in our law to admit of any doubt or discussion, either as to the principle itself or the reasons upon which it is founded, that a party claiming to rescind a contract on the ground of fraud must do so promptly upon discovery of the facts, and that if he delays, or takes any further steps in the execution of the contract, or does any act recognizing its validity, after discovery, he loses all right to this particular form of relief."

In the case of *Grymes v. Sanders*, 93 U. S. 55, it was held: "Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose, and adhere to it." The same doctrine was announced by this court in the case of *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434.

We therefore find that the defendants Laura T. Funk and Ancil L. Funk should be required to convey to the street railway company so much of lots 52 and 48, above described, as is now embraced in the strip of land 150 feet wide, occupied by the street railway and boulevard over and across their said lots; and as to the remainder of the $7\frac{1}{2}$ acres mentioned in their contract, if any there be, the description thereof is so indefinite that a court of equity will not require its specific performance.

It follows that the decree of the district court, so far as it relates to the issues between the defendant railway company and Laura T. Funk and Ancil L. Funk, should be, and is, reversed, and the cause is remanded to the district court, with directions to render a decree in harmony with this opinion.

JUDGMENT ACCORDINGLY.

GARWOOD H. ATTWOOD, APPELLEE, v. GEORGE M. WARNER ET AL.; JENKINS LAND & LIVE STOCK COMPANY, INTERVENER, APPELLANT.

FILED NOVEMBER 13, 1912. No. 16,851.

1. **Mortgages: POSSESSION BY MORTGAGEE: LIABILITY FOR RENT.** Where a mortgagee, without an agreement therefor, takes possession of the mortgaged premises before confirmation of a valid judicial sale, he thereby becomes liable to the mortgagor or his grantees for the amount of rents and profits which he receives, or which the land would have produced if prudently managed while he retains possession thereof.
2. ———: **CONVEYANCE BY MORTGAGOR: RIGHTS OF GRANTEE.** A sale and conveyance by the mortgagor or owner of the equity of redemption to a *bona fide* purchaser without any reservation vests such purchaser with the right to the rents and profits, which he may have applied upon the mortgage debt.
3. **Appeal: REMAND FOR JUDGMENT.** Where, upon consideration of the evidence, it is found that the trial court failed to credit the proper amounts of rents and profits upon the mortgage debt, the supreme court will determine such amount, and remand the cause to the district court, with directions to modify the decree accordingly.

APPEAL from the district court for Dundy county: ROBERT C. ORR, JUDGE. *Affirmed in part and reversed in part.*

W. S. Morlan, Charles T. Jenkins and Charles A. Robbins, for appellant.

Meeker & Hines and C. E. Eldred, contra.

BARNES, J.

This action, when it was commenced in the district court for Dundy county, was a suit in chancery for the foreclosure of a mortgage upon 474 acres of land situated in that county and known as the Warner ranch. The mortgage was executed by the Warners, who were the owners of the land, to the Western Farm Mortgage Trust Com-

pany, for the sum of \$2,500. It was sold and assigned by that company to one Garwood H. Attwood, who was the plaintiff in the foreclosure suit, and in which the mortgagors and others were the defendants. On the 9th day of April, 1894, the plaintiff obtained a decree of foreclosure as prayed. Thereafter there was a sale of the mortgaged premises, while there was on file a request for a stay, as provided by law. On an appeal by the Jenkins Land & Live Stock Company, which had become the owner of the equity of redemption, from an order of confirmation, the sale was set aside. *Jenkins Land & Live Stock Co. v. Attwood*, 80 Neb. 806. Meanwhile Attwood, by his agent, went into possession of the premises, and collected the rents and profits thereof from the date of the decree to the 27th day of April, 1908, when the Jenkins Land & Live Stock Company filed its petition for intervention in the original foreclosure suit, praying for an accounting of the rents and profits, and an application thereof to the satisfaction of the decree of foreclosure. To this petition Attwood filed an answer, and upon a trial of the issues joined the district court found that at the time of the trial there was due Attwood, on his original mortgage decree, the sum of \$6,474.12; that the rents and profits, while he had been in possession of the premises as mortgagee, amounted to the sum of \$2,474, which should be applied in part satisfaction of the mortgage debt; that the balance due on the decree of foreclosure, after deducting the rents and profits, was \$3,999.12, and from a judgment rendered upon such findings the Jenkins Land & Live Stock Company has prosecuted this appeal.

1. It is contended by the appellant that the district court erred in his finding as to the amount of rents and profits which should have been credited on the foreclosure decree, and he insists that Attwood should be charged with such an amount of rent as the land ought to or would have produced, if prudently managed; while, on the other hand, Attwood contends that he is only liable for the amount of rent actually obtained by him while he was in

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possession of the premises. This court is committed to the rule for which the appellant contends. In *White v. Atlas Lumber Co.*, 49 Neb. 82, it was held that a mortgagee in possession is liable for the net rents and profits which he has received or which he might have received by the exercise of reasonable care. This rule was followed in *Hatch v. Falconer*, 67 Neb. 249, and is supported by *Huston v. Stringham*, 21 Ia. 36. It appears that this rule was adopted by the trial court, and his conclusion on this point should be affirmed.

2. It appears that one Alma E. Jewett, who was the owner of the equity of redemption, together with her husband, conveyed the land in question to the appellant, the Jenkins Land & Live Stock Company, by quitclaim deed, which contains the following provision: "By these presents do, for themselves, their heirs, executors, and administrators, remise, release, and forever quitclaim unto the said party of the second part, and to its heirs and assigns forever, all their right, title, interest, estate, claim and demand, both at law and in equity, of, in, and to all the southwest quarter (describing the mortgaged premises), together with all and singular the hereditaments and appurtenances thereunto belonging. To have and to hold the above described premises unto the said Jenkins Land & Live Stock Company, its heirs and assigns, so that neither we, the said Alma E. Jewett and Ed. Jewett, nor any person in our name and behalf, shall or will hereafter claim or demand any right or title to said premises or any part thereof, but they and every of them shall by these presents be excluded and forever barred." That afterwards Attwood, through the intervention of one Wilhelm, obtained from the Jewetts a purported assignment of the rents and profits in question; and it is argued that, by reason of that fact, the appellant is not entitled to have them applied on the foreclosure decree. We are of opinion, however, that by the quitclaim deed above mentioned the appellant obtained the right to the rents and profits, and that thereafter, when the Jewetts attempted

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to assign them to Attwood, they had no interest therein. Such was the finding of the district court upon that question, and it should be affirmed.

3. It follows that the only question which remains for our determination is the one relating to the value of the rents and profits to be applied upon the mortgage debt. Upon this question the evidence is widely conflicting. Some testimony was produced by the appellant tending to show that the reasonable rental value of the premises was from \$300 to \$500 a year. But this, in view of the existing conditions, is in our judgment quite excessive. On the other hand, some evidence was introduced by the appellee fixing the rental value at from \$75 to \$125 a year. As we view the evidence, this is much less than the true rental value; and, after carefully considering all of the testimony, we find that by reasonably prudent management the ranch of 474 acres, covered by the mortgage, could have been rented for \$200 a year for the 11 years of Attwood's possession. This, with interest properly computed, amounts to \$2,872, which should have been applied in part satisfaction of the amount due Attwood on the foreclosure decree, and upon this question the judgment of the district court is reversed, but in all other things the decree appealed from is affirmed. The cause is therefore remanded to the district court for Dundy county, with directions to enter a decree in conformity with this opinion.

JUDGMENT ACCORDINGLY.

LONZO D. WHITFORD, GUARDIAN, APPELLANT, v. HENRY
KINZEL ET AL., APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,574.

1. **Homestead: ABANDONMENT: INCOMPETENCY.** One whose mental faculties are so impaired that she is incapable of forming a clear intention to abandon her homestead will not be held to have done so merely because she departed therefrom and remained away for a short time, and until placed in an insane asylum.

2. ———: ———: BURDEN OF PROOF. All presumptions are in favor of the preservation of the homestead, and, when it is sought to show its abandonment, the burden of proof rests upon the person who attacks the homestead interest.
3. ———: WHAT CONSTITUTES. A wife owned 80 acres of land, upon which was the dwelling-house and 15 acres of cultivated land. Her husband owned the adjoining 80 acres, on which 45 acres were under cultivation. The farm was operated as a whole and rented as a whole. *Held*, No rights of creditors being involved, that the whole 160 acres constituted the family homestead.
4. Descent and Distribution. Where a person owning real estate dies, leaving a wife surviving, it descends, subject to his debts and the rights of homestead, one-half to the wife if there be no child, nor the issue of any deceased child or children, surviving, and, if the deceased leave relatives of his blood, the residue descends in the same manner and to the same persons as provided for the descent of real estate of deceased persons leaving no husband or wife surviving. Comp. St. 1907, ch. 23, sec. 1.
5. Homestead: RENTS AND PROFITS. A wife is not, by virtue of the marriage relation alone, entitled to recover the rents and profits of a portion of the family homestead owned by the husband in fee simple, either before or after an attempted conveyance by him of the premises.
6. ———: ABANDONMENT: EVIDENCE. The evidence set forth in the opinion *held* to be insufficient to establish the abandonment of a homestead.

REHEARING of case reported in 90 Neb. 573. *Former judgment of affirmance vacated, and judgment of district court reversed.*

LETTON, J.

The statement of facts found in the first paragraph of the former opinion (90 Neb. 573), so far as it goes, is correct and will not be repeated. It may be well to state, however, that at the time that Kinzel bought the property he was fully informed of the fact that Mrs. Browand was insane and under guardianship. It is also shown that Browand at first was offered \$4,200 for the land, presumably with a marketable title, and that upon all the facts being disclosed, and after further negotiation, the pur-

chaser was only willing to pay the sum of \$3,700, on account of the defect in the title. The deed itself, after describing the land, contained the provision: "Subject to any and all rights and interests, either legal or equitable, of my wife Frances E. Browand, and to said real estate. Subject to the taxes for the year 1906. Together with all rents from and after March 1st, 1906, with all the tenements, hereditaments and appurtenances thereunto belonging. And I, the said D. C. Browand, do hereby covenant with the said Henry Kinzel, his heirs and assigns, as follows, to wit: That I am a married man; that my wife's name is Frances E. Browand; that in the year 1886 my wife and I removed from the state of Nebraska to the state of Indiana with the intention of permanently leaving said state of Nebraska; that since the time of said removal to the said state of Indiana both of us have lived in that state and are both of us living there at the present time; that for more than fifteen years last past I have lived separate and apart from my said wife, but that we are both residents of the state of Indiana at this time and have been for over fifteen years last past; and that I am lawfully seized of said premises; that they are free from all incumbrances except as above stated," etc.

It is said in the former opinion: "The evidence is insufficient to show that at the time Mrs. Browand left Nebraska she was insane, or that her mind was so unsound or unbalanced that she was not competent to understand the nature and import of what she was doing; but it is sufficient to show that she voluntarily left her husband and abandoned her home and any right of homestead that she may have had in the lands in suit, with no intention of ever returning or of ever again asserting those rights."

Upon a careful rereading of the entire testimony, we are convinced that the first proposition quoted is sound and reflects the evidence, but the further conclusion that the evidence is sufficient to show a voluntary abandonment of her husband and her homestead rights we think is erroneous.

It is unnecessary to set forth the testimony at length. As to Mrs. Browand's mental condition, it clearly shows that at and before the time she left Nebraska she was subject to insane delusions with respect to certain subjects, but there is nothing to show that at that time she did not understand the nature and extent of her property rights, or that she was incapable of caring for herself, transacting ordinary business, or traveling alone. While there is a little uncertainty in regard to the year on the part of some of the witnesses, it seems to be established that the last time she left Nebraska was in the spring of 1886, shortly after a visit from Mr. Wright, her brother. The testimony of relatives that she visited in Indiana is that, when she came there, she merely came upon a visit, as she had done upon several occasions in previous years, that she spoke of her home in Nebraska, and that she intended to return. She tried to borrow money from her brother for that purpose. She was under a physician's care at this time. Her brother and other friends would not allow her to return to Nebraska. There is no doubt that her disease rapidly progressed after she left Nebraska, and that she gradually became more and more afflicted until it became necessary to restrain her in the asylum. For some months before she left her home, she and her husband had not lived harmoniously together. He had left the family home to board at a hotel in a town nearby. During the brother's visit, he returned to the family dwelling temporarily. After Mrs. Browand left, the husband rented the farm, stored the household goods in town, and went to Indiana. He visited with his own relatives there, and the year after his wife was committed to the asylum came back to Nebraska, sold the furniture, which had been stored, and returned to Indiana, where he continued to reside for nearly 20 years and until his death in 1908.

All presumptions should be in favor of the homestead, and, when it is sought to show an abandonment, the burden of proof should rest upon the one who attacks the homestead interest. *Union Stock Yards Nat. Bank v. Smout*,

62 Neb. 227; *Painter v. Steffen*, 87 Ia. 171; *Benbow v. Boyer*, 89 Ia. 494; *Reeseman v. Davenport*, 96 Ia. 330; *Robinson v. Charleton*, 104 Ia. 296. We are satisfied this burden has not been sustained, and that Mrs. Browand did not abandon the homestead.

Mrs. Browand owned in fee simple the west 80 acres of the quarter section, of which only 15 acres were cultivated. There were 45 acres in cultivation upon the 80 acres in dispute. The farm was operated as a whole and rented as a whole. Under these facts, the majority of the court are of the opinion that, regardless of value, the whole 160 acres constituted the homestead, following *Meisner v. Hill*, p. 435, *post*. This being so, under the rule announced in *Weatherington v. Smith*, 77 Neb. 363, the homestead right of Mrs. Browand was unimpaired by the removal of her husband while she was insane, and the deed was void in law. Adopting this construction, what are Mrs. Browand's rights? Browand died without issue, but with brothers and sisters surviving. Section 1, ch. 23, Comp. St. 1907, provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance at any time during the marriage, * * * which has not been lawfully conveyed by the husband and wife while a resident of this state, or by the deceased while the husband or wife was a nonresident of this state * * * shall descend, subject to his or her debts and the rights of homestead, in the manner following: * * * Fourth. One-half to the husband or wife if there be no child, nor the issue of any deceased child or children, surviving. Fifth. If the deceased leave relatives of his or her blood, the residue of the real estate of which he or she shall die seized, in the cases above named, when not lawfully devised, shall descend subject to the rights of homestead, in the same manner and to the same persons as hereinafter provided for the descent of real estate of deceased persons leaving no husband or wife surviving." Mrs. Browand by virtue of her homestead right succeeded to a life estate in the premises upon her

husband's death, and under the foregoing provisions she inherited an undivided one-half in fee.

Browand, being the fee title holder and the head of the family, was entitled to the rents and profits until 1906 when he made the conveyance. If the conveyance was void, he was entitled to them until the time of his death in 1908. There being no proof that he failed to support his wife, she could make no claim to them as against him. This being the case, Mrs. Browand did not become entitled to the rents and profits until after Browand's death, and she takes the land subject to the duties imposed by law upon tenants for life.

The evidence shows that Mrs. Browand's guardian filed a claim against the estate of Browand for the money derived from the sale of the land, but it is not shown whether the claim was allowed. What bearing upon the rights of the parties to this suit the collection of this money from his ward's estate would have is not before us, and we express no opinion on this point. Since a considerable interval of time has elapsed since the trial, any further relevant and material facts in this connection may be brought out at another hearing. Having settled, as far as we may with the evidence before us, the legal relations of the parties, the cause is reversed and remanded to the district court for further proceedings.

REVERSED.

BARNES, FAWCETT and ROSE, JJ., dissent.

WILHELM LABS, APPELLANT, v. CHARLES LABS ET AL.,
APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,795.

Wills: TESTAMENTARY AGREEMENT: SPECIFIC PERFORMANCE: EVIDENCE.

Where it is sought to establish an oral agreement to make a testamentary disposition of property and to set aside the provisions of a will in so far as they conflict with said alleged

agreement, the proof to establish the existence of such oral agreement must be clear, convincing and satisfactory, in order to overcome the presumption that the testator acted in good faith in the execution of the will.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Charles Haffke and Thomas E. Brady, for appellant.

T. J. Mahoney and J. A. C. Kennedy, contra.

LETTON, J.

This is an action for the specific performance of an alleged parol agreement between the plaintiff and his father, Ferdinand Labs, now deceased, that the father would make a testamentary disposition of 80 acres of land in his favor, and praying that a will executed by the father, wherein the defendants are bequeathed certain sums of money which by the will are made a charge upon the land in controversy, be set aside, that a deed executed by the father in his lifetime conveying the same premises to Ferdinand F. Labs be also set aside, and the plaintiff's title to the real estate be quieted. The district court found for the defendants and dismissed the suit. Plaintiff bases his right to recover upon the proposition that the facts in the case bring it within the rule of *Kofka v. Rosicky*, 41 Neb. 328; *Harrison v. Harrison*, 80 Neb. 103; *Peterson v. Bauer*, 83 Neb. 405; *Hespin v. Wendeln*, 85 Neb. 172; *O'Connor v. Waters*, 88 Neb. 224. Defendants assert that the evidence is wholly insufficient to establish the alleged contract. A number of questions of law as to the admission and rejection of evidence are argued in the briefs; but, owing to the view that we take with respect to the evidence, we are satisfied that, even if the district court had ruled otherwise as to the admissibility of this testimony, we would have been compelled on a view of the whole case to reach the same result. For this reason, these questions will not be considered.

Ferdinand Labs came to this country from Germany

more than 30 years ago. When he first came he became a tenant farmer in Douglas county, but finally purchased 160 acres of land, which at the time of his death was encumbered to the extent of \$2,700. The land was then worth from \$65 to \$70 an acre. He made the will which is attacked in March, 1907, and died in July, 1909. He was the father of eight children, one of whom is the plaintiff. The others are the defendants in this case. The will, after providing for the payment of his debts, left \$400 for a suitable monument and for the care of his grave. To the plaintiff, his son William, he left \$1,000; to each of his sons Charles and August he left \$500; to each of his three daughters he left \$400; to his son Albert he devised the east one-half of the home farm of 160 acres, subject to half of the mortgage indebtedness, and charged with the payment of one-half of the debts, charges and legacies; and to his son Ferdinand F. Labs he devised the west 80 acres, subject to incumbrance, and charged to the same extent. In the interim between the making of the will and his death, Ferdinand Labs conveyed by deed to his sons Albert and Ferdinand F. the same premises which the will provided should be devised to them, subject to the same charges, and also subject to a life estate in the grantor. At the same time each son leased his portion of the land from the father, agreeing to pay \$200 a year and taxes upon the property as rent for each 80-acre tract.

Coming, now, to the evidence upon which plaintiff relies: His testimony is to the effect that, when he was about 22 or 23 years of age, he and his parents went for a visit to the home of a man named Lucht, who lived near Millard; that he then heard a conversation between his father and Lucht, in the course of which Lucht asked his father what he would give William if he stayed at home, and that the father told Lucht he was going to give him an 80-acre tract if he worked for him until he got married. Plaintiff testified, further, that he continued to live upon the farm and work for his father until he was 33 years old; that his mother died about 6 years ago, and that about that time he

heard a conversation between Mr. Gehrke, the Lutheran minister, and his father; that Gehrke said, "'You better let him have the eighty now to build a house on,' and he says, 'No, you can build that after I am dead.'" He further testifies, "I asked father for wages, and he said, 'No,' he would not give me wages, but he would give me an eighty after he is dead, and that is the reason Mr. Gehrke came in there and wanted to settle between us two." On cross-examination he says that he claimed his father owed him wages from the time he was 21 years old up to that time; that he took no part in the conversation with Gehrke, and that he does not know how Gehrke came to know of the dispute; that he did not ask Gehrke to come and settle it. Other witnesses testify to statements by the father that he intended to give plaintiff 80 acres of land when William was married or that William should have 80 acres when he died, but their testimony is indefinite and does not appear to relate to any definite contract made between the father and son. On the other hand, Gehrke denies that such a conversation as William relates ever took place with the father. On cross-examination he states that, about the time spoken of by William, he had a conversation with the mother, who said that they planned to give William an eighty, but there was nothing said about any agreement having been made to that effect. Mr. Lucht was also unable to remember any such conversation as was testified to by plaintiff, and said positively none such took place.

Some other facts relating to the usage of the family and the manner in which each child was started in life by the parents cast some light upon the problem. Charles Labs was married at the age of 27. Before that time his father received the benefit of his work. Upon his marriage his father gave him \$500, and by the will he is to receive \$500 more, half of which is charged upon the 80 acres in controversy. August was married at the age of 22. Until that time his father received his wages. Under the will he was to receive \$500, one-half of which is charged upon

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this eighty. Each of the daughters went out at service, brought her wages home for the use of the family, and each at marriage received a few household goods. Under the will each will receive \$400. Albert was 39 years old when the trial was had. He was married, but worked upon the home place until his father died. He received some personal property upon his marriage, and, as before stated, has received the east one-half of the quarter section, subject to the debts and charges. His inheritance will be the same as specified in the will, even if the plaintiff should recover; while Ferdinand, who turned over to the family the fruit of his labor until he was 25 years of age, at which time he was married and received some personal property, will, if the plaintiff is successful, lose his land, and will also lose \$350 which he has already paid in cash in part satisfaction of the incumbrance existing upon the land at his father's death. If plaintiff prevails, one-half of all the legacies charged upon the land of Ferdinand must fail, and Ferdinand himself will lose the land. A reading of the whole record convinces us that Ferdinand Labs, who was apparently a hard-working, God-fearing, and just man, endeavored to discharge his duties to his family impartially and with justice. His conduct in this respect, subsequent to the time of the alleged making of a contract with plaintiff, seems inconsistent with plaintiff's theory.

Considering all the testimony in the record with relation to the history of the family, the conduct of each of the children with reference to the father and mother, the time each worked upon the farm, the provision made for each of them by the father when he or she married and set up housekeeping for himself or herself, and the provisions made in the will for the distribution of the property, in connection with the evidence in behalf of plaintiff, we are convinced that the plaintiff has not sustained the burden of proof by clear, convincing and satisfactory evidence, such as is required in cases of this nature.

The judgment of the district court is

AFFIRMED.

**SAMUEL A. KINNEY, APPELLEE, v. CHICAGO, BURLINGTON
& QUINCY RAILROAD COMPANY, APPELLANT.**

FILED NOVEMBER 13, 1912. No. 16,812.

1. **Appeal: CONFLICTING EVIDENCE.** Where the evidence is conflicting as to whether a cow that was killed by a train got on the right of way through a gate negligently left open by plaintiff or by passing through a defective right of way fence and there is sufficient evidence to support the verdict, this court will not interfere, even though it might reach a different conclusion upon the same evidence.
2. **Trial: INSTRUCTIONS.** A case will not be reversed on account of the giving of an instruction which is not based upon the evidence, where the jury has been properly instructed on the point at issue at the complainant's request, and it is not apparent that prejudice has resulted.
3. **Pleading: ANSWER: SUFFICIENCY.** An answer which admits that a railway company "is now operating" the railroad, and does not specifically deny that it was the owner of or was operating the railroad at the time of the accident, is not sufficient to raise the issue of its ownership of or operation of the railroad at that time.
4. ———: **AMENDMENT AT TRIAL: DISCRETION OF COURT.** Whether defendant shall be permitted to amend an answer after a trial has been begun is a matter within the discretion of the district court, and unless abuse of such discretion is shown the action of that court will be upheld.

APPEAL from the district court for Gage county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Byron Clark and Hazlett & Jack, for appellant.

A. D. McCandless and Samuel Rinaker, contra.

LETTON, J.

Plaintiff recovered a verdict and judgment against defendant upon four causes of action, the first being for the wrongful killing of a cow upon the railroad track of defendant, the others being for three separate fires in the

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orchard of plaintiff, which it is alleged were caused by the negligence of defendant in operating its trains.

It is contended there is not sufficient evidence to sustain the verdict as to the first cause of action. A large number of plaintiff's cattle were on the right of way, but only one cow was killed by the train. The evidence is conflicting as to the condition of the railroad fence. On behalf of plaintiff, there is testimony that the fence was in very bad condition; that at different places the wires were off the posts for a distance of over two rods; that in another place the highest wire was only 22 inches from the ground; that at other places the wires were buried in the dirt, and at still another place the ground was washed out underneath the fence so that a person might walk beneath. Plaintiff testifies that he examined the fence on the day the cow was killed, and saw many fresh tracks where cattle had passed over it, when the wire was down, onto the right of way.

On the part of the defendant, there is testimony that the fence was in fairly good condition, although cattle could walk through at the place where the soil was washed out, but that there were no tracks there or at other points where the fence was defective. There is also proof that a gate in the fence was left open by plaintiff or his man. There is a decided conflict as to whether or not there were tracks showing that the cattle had passed through the dilapidated fence or through the gate in order to reach the right of way. The evidence being in this condition, the question of fact was for the jury to decide.

Complaint is made as to the giving and refusal of certain instructions relating to this cause of action. After stating to the jury that the law of this state required railroads to fence their tracks, and the respective claims of the plaintiff and defendant as to the manner that the cow got on the right of way, the court properly instructed the jury that, if they found she passed through the fence, the defendant was liable, but, if they believed she passed through the gate, then they should find for the defendant,

unless they found that the plaintiff was entitled to recover by reason of the negligence of the engineer. He also told the jury in instruction No. 5 "that it is the duty of the engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions upon the track, and in this case, if such a precaution would have revealed the presence of the cow on the track in time to have avoided her injury by the use of ordinary care, the railroad company was liable for injuries inflicted upon her, although she was not actually seen until too late to avoid striking her." It is said this instruction is erroneous because not applicable to any evidence in the case; that the evidence showed the cow came on the track from the borrow pit just before she was struck. The court, at defendant's request, fully instructed that, if they believed this to be true, there was no negligence in the handling of the train which would enable plaintiff to recover. We think no prejudice could be suffered under this condition of facts.

Complaint is made of the giving of instruction No. 4, for the reason that by it the jury are not required to base their findings upon the evidence in the case. We think, in view of the other instructions which were given by the court, some of them at defendant's request, in one of which the jury were expressly told they "should look wholly to the evidence for the facts," and in others they were told that, if they "found from the evidence," etc., this complaint is without merit.

Considering the entire testimony on this cause of action, the issue seems to have been fairly submitted, and we find no error therein prejudicial to defendant.

Complaint is made that the court erred in failing to submit to the jury an issue as to whether defendant in this case, the Chicago, Burlington & Quincy Railroad Company, or the Chicago, Burlington & Quincy Railway Company, was the owner of or was operating the railroad at the time stated in the petition. We think the pleadings justify the court in ignoring this so-called issue. The

answer admits that the defendant "is now operating" the railroad. It pleads that the death of the cow was caused by plaintiff's negligence, and contains a general denial as to all facts "not herein specifically admitted to be true." No specific denial of defendant's ownership of the road at the time of the accident is to be found in the answer. We think the admission that it is now operating the road carries with it, in the absence of a specific denial, the presumption that it was operating the road at the time the injuries were suffered.

It is also assigned that the court erred in refusing to permit an amendment to be made to the answer alleging negligence on the part of plaintiff in permitting weeds to stand, and rubbish to accumulate in the orchard. This amendment was proposed after the jury were impaneled for the trial. The original answer was filed on November 15, 1909. The amendment was tendered on March 3, 1910. The plaintiff's farm seems to be distant at least 15 miles from the place of trial, and any additional witnesses made necessary by the amendment would have to be summoned from that distance. Even if this amendment set up a new defense, no reason was shown why it was not tendered before the time of the trial. At such a time and under all the circumstances we think the district court was justified in refusing to permit the amendment.

Some of the witnesses for the defense testify that a number of the trees which had been damaged by the fire scorching or burning the lower limbs could be restored by pruning the injured limbs. Defendant requested an instruction that the measure of damages as to such trees "is the value of the labor of trimming off such lower limbs, as to which there is no evidence except that it would be nominal, so that for such trees you could in no event award plaintiff anything but nominal damages." We think this instruction was properly refused. It was proper for the jury to consider this testimony in arriving at their verdict as tending to mitigate the damages, but we think the tendered instruction erroneous. The jury

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were instructed that the measure of plaintiff's damage was the difference in value of the trees injured or destroyed as they stood immediately before the fire and immediately after the fire, and this is the true rule, as repeatedly decided by this court.

We find no prejudicial error in the record, and the judgment of the district court is

AFFIRMED.

JONAS MICHAEL MUSSER, APPELLANT, v. MICHAEL P. MUSSER, APPELLEE.

FILED NOVEMBER 13, 1912. No. 17,041.

1. **Pleading: AMENDMENT AT TRIAL: DISCRETION OF COURT.** The original answer contained a plea of fraud, threats, and intimidation used to obtain the note sued upon, and also pleaded that the note was given upon a condition. The court during the trial permitted an amended answer to be filed pleading the condition, but omitting the other plea. *Held*, This was within its discretion and not erroneous.
2. **Parol Evidence: CONDITION AFFECTING NOTE.** In an action between the original parties to the instrument, it may be shown by parol that a promissory note was delivered upon a condition that it should only be payable upon a certain event. *Davis v. Sterns*, 85 Neb. 121.
3. **Bills and Notes: CONSIDERATION.** A settlement of a disputed claim may constitute a good consideration for a promissory note, provided that the claim is made by the payee in good faith and on reasonable grounds, even though he may be mistaken as to the basis of his claim.
4. ———: ———: **ALTERATION OF NOTE: BURDEN OF PROOF.** And when the dispute was as to whether a prior promissory note, which had been altered, was changed before or after its execution and delivery, if the claim of alteration after delivery was made upon reasonable grounds and in good faith, it was not incumbent upon the plaintiff payee to establish as a fact that the defendant maker altered the prior note after its execution.

APPEAL from the district court for Sheridan county:
JAMES J. HARRINGTON, JUDGE. Reversed.

J. E. E. Markley and A. W. Crites, for appellant.

John J. Sullivan and C. Patterson, contra.

LETTON, J.

This is an action upon a promissory note for \$3,000, executed by the defendant in favor of the plaintiff, and due and payable one year from date at Niles, Iowa. The defendant in his original answer admitted the execution and delivery of the note, but alleged that it was without consideration, and had been procured by threats, intimidation, fraud, and undue means, and further pleaded that it had been delivered upon a condition, which is also set out in the amended answer.

The amended answer admitted the execution and delivery of the note, but alleged that it was made without consideration and that it was executed under circumstances substantially as follows: That in 1899 the plaintiff and his wife executed a note to defendant for \$10,500, secured by a mortgage on land in Iowa, payable five years after date at the Citizens Bank at Rushville, Nebraska; that in 1905 defendant went to Charles City, Iowa, to collect this note; that plaintiff then asserted he had written defendant in December, 1902, to send the note and mortgage and release of the same to the bank at Charles City for payment on or before January 1, 1903, so that he could make a deed to a purchaser of the farm, and that through the negligence of defendant to forward these papers to him he had lost the sale and had been damaged in the sum of \$3,000; that it was then and there agreed that defendant should execute and deliver the note sued upon, to be held in trust by plaintiff until defendant should return to his home at Rushville, Nebraska, when, if he failed to find such a letter asking him to send the papers to Charles City, then plaintiff was to return to defendant the \$3,000 note. Defendant denies that plaintiff requested him to send the note and mortgage and release to Charles City, denies that he was under any obligation to do so, or

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that he contributed in any way to the damages claimed by plaintiff, but admits that on January 14, 1903, plaintiff requested him by letter to send him a release of the west half of the property described in the mortgage.

The reply pleads that the mortgage securing the \$10,500 note provided that, in case of the sale of the land, the whole debt should become due and payable; that about November 1, 1901, plaintiff entered into a contract of sale of a portion of the land; that he requested defendant orally and in writing to send him a release of the mortgage, so that plaintiff might pay off the same and convey the land according to his contract; that defendant orally agreed to send the release before January 1, 1903, but failed and refused to do so and to accept the money due on the mortgage; that, by reason of such failure, plaintiff lost the sale of the land, was sued by the purchaser and compelled to pay a large amount of damages; that, when defendant was in Iowa to collect the \$10,500 note, plaintiff refused to pay the same, for the reason that he had been damaged by the failure to release the mortgage, and because the note had been fraudulently altered; that he then claimed \$3,000 damages, and that the note sued upon was executed in settlement of this claim, and in consideration that he would pay the altered note without suit. It is also alleged that the \$10,500 note was originally made payable at the Citizens National Bank at Charles City, Iowa, and that after its execution the defendant, without his knowledge or consent, altered the same so as to make it payable at the Citizens Bank, Rushville, Nebraska.

The defendant is 76 years old, lives at Rushville, Nebraska, and plaintiff is his nephew. He testified that he went to Iowa in March, 1905, to collect the \$10,500 note. "I gave this note to bring about the payment of another note that I held against him for damages if it were my fault that he had damages. I told him I would pay him damages if it was my fault and if he paid me the note; and he said that if he did pay me the note he would only have my word for it, would have nothing to show; and

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then I said, 'I will give you my note for \$3,000, and I will pay you my note if your letters are as you state when I get home and see them.' " He also says plaintiff and his wife accused him of committing a crime by changing the place of payment of the note, and that they had written him before this that the note had been altered. He denies specifically that the place of payment of the note was changed from "Citizens National Bank, Charles City, Iowa," to "Citizens Bank, Rushville, Nebraska," after its execution and delivery, and testifies that the place of payment was changed by Judge Burr, plaintiff's attorney, who wrote the note and mortgage at his (defendant's) request, and that this was done before the note was signed. He also testifies that in the final talk at the bank in Charles City, Iowa, Mr. May, the banker, figured up the amount due on the \$10,500 note, and found it to be \$11,281.55. Eleven thousand dollars was paid, part in April and part in May, 1905, by remittance to Rushville from the proceeds of a loan made by plaintiff. This left \$281.55 still owing. No claim was made for this until this suit was brought, and no notice was sent plaintiff that defendant had found no letter, until after the note was due. The testimony of the plaintiff and defendant agrees in most particulars as to the facts surrounding the execution and delivery of the \$3,000 note, with the essential difference that plaintiff testifies that the conversation as to going home and looking for the letter had no reference to the \$3,000 note, but referred to the \$281.55, balance due on the \$10,500 note, and that defendant agreed that, if such a letter was found, defendant was to let him have the \$281.55, while, if such a letter was not found, he was to pay the full sum. Both parties testify that early in 1902 defendant knew of the sale by plaintiff of a portion of the land, deed to be made January 1, 1903, and that plaintiff desired a release of mortgage by that time, but defendant says that plaintiff was to let him know definitely in time to send it. Defendant wrote the \$3,000 note himself, and, when asked why he did not write the

condition upon which he claimed it was payable into the contract, answered that it was an oversight. He also says, in substance, that he knew that, if he commenced a foreclosure action, the plaintiff, his wife and his attorney would probably testify against him that the note was changed, and, if the defense was established, his note would be void, and this influenced him in making the \$3,000 note.

Sarah E. Musser, plaintiff's wife, testified that, when defendant visited the house in 1905, he was told the trouble he had caused and the damage it had been to them, and that he finally said he was willing to make it good, and that he and her husband then went to town and made a settlement. Chesta A. Musser and Mayme L. Musser, children of plaintiff, testified to the same conversation. Plaintiff testified that the place of payment of the \$10,500 note was altered; that he first learned of the change when it was sent to the bank for collection in the fall of 1905; that in his opinion the words "Rushville, Nebraska" are in defendant's handwriting. He further testifies that he wrote to defendant about sending the release of mortgage about December 1, 1902; that he was unable to perform the contract of sale on account of the release not being forwarded, and that he was sued by the purchaser on this account; that afterwards the land depreciated in value so that he could not sell it; that at the time the \$3,000 note was given there was a dispute as to whether the note had been changed, and also as to whether defendant had been notified to send the papers and release; that defendant finally agreed to pay \$3,000 in settlement. He denies that there was a condition that defendant should not pay if he failed to find such a letter on his return to Nebraska, but that what defendant said was when he got home and looked his letters over, "If I find one letter that you wrote me that you sold that farm, I will give you the \$281.55;" that, if defendant failed to find the letter, he was to let plaintiff have the \$281.55, and was to notify Mr. May. If he found no letter, Mr. May was to send him the \$281.55, and, if he found the letter, Mr. May was to turn the

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money over to plaintiff. Mr. May testified that defendant gave him instructions to send him at Rushville \$11,000 in payment of the note and mortgage; that he asked defendant what to do with the "overplus," and that he said, "I am going home, and, if I find some letters of Peep, as we call him, I shall write you to give the money to him, if the letters are the way he says they are, and, if they are as I think they are, why the money is to come to me." He also says, "I didn't hear from M. P. Musser, so I turned the money, \$281, over to the plaintiff, and remitted to M. P. Musser the \$11,000. M. P. Musser never wrote me in any way about the \$281." He further testifies that he is intimately acquainted with the handwriting of Judge Burr, and the words "Rushville, Nebraska," in the \$10,500 note are not in his handwriting.

The jury found for defendant, and a judgment of dismissal was rendered.

The first assignment of error made is that the court erred in overruling the challenge for cause of the juror David Dullaghan. We think it would have been entirely proper to have sustained the challenge to this juror, who was a director in the bank of which defendant is a director and stockholder, had known the defendant for many years, and was on intimate and friendly terms with him. The defendant was an intimate friend, and the plaintiff was a stranger. The record seems to show that defendant's peremptory challenges were exhausted before this challenge was made. While the juror seems to have been candid and honest in his replies to questions propounded, the intimate nature of his social and business relations with the defendant was such that there was a probability that, however conscientious he might be, it would be difficult for him to be entirely impartial in such a doubtful case. We think the juror should have been excused, though we would be reluctant to reverse the case and grant a new trial for the sole reason that this juror was retained.

It is next objected that the defense in the amended answer is inconsistent with that in the original answer, and

that it was such a substantial change that the court should not have permitted the same; that one who has refused to perform a contract upon an assigned ground cannot, after litigation has begun, change his defense and base it upon some other inconsistent basis. We are unable to see such a decided difference between the two answers. It is true that the first pleads that plaintiff obtained the \$3,000 note by fraud, and by threats and intimidation. These words are general terms. There are no specifications, except that plaintiff falsely contended that he had sold the land and was unable to make the transfer because defendant had failed after notice to release the mortgage. It further pleads the condition which is set out in the amended answer. We think it was entirely within the discretion of the court to permit the amended answer, and that plaintiff suffered no prejudice thereby.

The next complaint is that it was erroneous to overrule the motion of plaintiff to strike out the testimony as to the condition upon which he says the note was given, because its tendency was to impeach and add to the terms of a written instrument. This, we think, also must be disregarded. We have held that, as between the original parties, a contemporaneous agreement, by the terms of which a condition was established upon which the instrument became payable, may be established by parol testimony. *Davis v. Sterns*, 85 Neb. 121; *First Nat. Bank v. Burney*, 91 Neb. 269.

The district court also committed no error in overruling a motion of plaintiff for a peremptory instruction to find in his favor. While the execution and delivery of the \$3,000 note was admitted, the vital issue remained whether there was a consideration for the note, and whether it was executed and delivered upon the condition that it should only be payable in the event that defendant found a letter requesting him to send the release of mortgage before January 1, 1903.

Plaintiff complains of the giving of instruction No. 2.

We are inclined to the view that this instruction placed an undue burden upon defendant, in that it required him to establish by a preponderance of the evidence, among other things, that the place of payment of the note was at the Citizens Bank at Rushville, Nebraska. The presumption is that any alterations shown upon the face of the note were made before it was signed and delivered, and the burden of proving an alteration lies upon the person who asserts it to have been made. *Dorsey v. Conrad*, 49 Neb. 443; *Colby v. Foxworthy*, 80 Neb. 239. It is perhaps subject to criticism in some other respects, but, if error was made in giving it, it seems to us to be rather to the prejudice of defendant than plaintiff.

We are of opinion that instructions No. 4 and No. 6 are erroneous, for the reason that they make it essential to recovery that the plaintiff prove to the satisfaction of the jury that, after the plaintiff and his wife gave the \$10,500 note, the defendant altered and changed the place of payment of same. Instruction No. 6 is as follows: "The jury are instructed that, if you find from the evidence that the plaintiff refused to pay said \$10,500 by reason of damages alleged to have been sustained through the negligence of the defendant in failing to send a release of \$10,500 mortgage to a bank in Charles City, Iowa, and the plaintiff also refused to pay said \$10,500 note under the claim that the place of payment of said note had been altered and changed by the defendant, and you further find from the evidence that, after the plaintiff and his wife gave said note of \$10,500, the defendant did alter and change the place of payment of said note, and there was a dispute between the plaintiff and defendant as to whether or not the plaintiff had sustained damages and the amount thereof, and that, under these circumstances and for the purpose of settling said matter, the defendant herein gave to the plaintiff the promissory note sued upon, then this would be a good and valid consideration for the making of the said note, and the plaintiff would be entitled to recover."

This instruction stated certain conditions which it became necessary for the evidence to establish in order to constitute a good and valid consideration for the making of the note and to entitle plaintiff to recover: (1) That the plaintiff refused to pay the \$10,500 note by reason of the damages alleged to have been sustained; (2) that he also refused to pay, under the claim that the note had been altered; (3) that the defendant did alter and change the note; (4) that there was a dispute as to whether plaintiff had sustained damages; (5) that for the purpose of settling the matter the defendant gave the note sued upon. We think it was not essential for the plaintiff to establish the fact that the defendant altered and changed the \$10,500 note. If the note showed upon its face an alteration, and the evidence is such as reasonably to justify the conclusion that the plaintiff in good faith believed that the note had been changed after it was signed and delivered, and there was an honest and well-founded difference between the parties as to whether such alteration had been made, this, in connection with the dispute between the parties as to the liability of defendant for damages incurred by reason of his failure to send a release of mortgage to plaintiff, if this claim was also made in good faith and on reasonable grounds, constituted such a controversy that a settlement of the same would constitute a good consideration. It is not the fact of alteration which is essential, it is whether or not there was a well-grounded reason for this assertion by the plaintiff, and that he made the same in good faith.

Complaint is made as to a number of other instructions asked by the defendant and refused. It is unnecessary to discuss each of these separately. Some of them are erroneous, in that they omit the element of good faith on the part of the plaintiff in making the charge that the note was altered and in making the claim for damages. Some of them, however, contain statements as to issues which should have been submitted to the jury, though perhaps not in the exact language of the requests.

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The question whether, conceding that there was an adequate consideration, the note was delivered to plaintiff upon the condition that it should not be payable unless defendant on his return to Rushville found a letter written prior to January 1, 1903, requesting a release of the mortgage, seems not to have been submitted to the jury at all, except in the sixth paragraph of instruction No. 2, and, even then, in terms which were perhaps too general for the jury to extract the thought. We think that the plaintiff's side of the case should have been presented more fully.

There were really only two issues in the case: First. Was there a good consideration for the \$3,000 note? Second. If there was such a consideration, was the note delivered upon a condition. We think the instructions given fail to submit these issues clearly. The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

CENTRAL NATIONAL BANK, APPELLEE, v. JOHN ERICSON.
APPELLANT.

FILED NOVEMBER 13, 1912. No. 16,793.

1. **Appeal: DIRECTING VERDICT: REVIEW.** In reviewing a direction to the jury to return a verdict in favor of plaintiff, the appellate court will assume the existence of every material fact which the evidence on behalf of defendant establishes or tends to prove, and give him the benefit of proper inferences from such facts.
2. **Bills and Notes: DEFENSE OF FRAUD: BURDEN OF PROOF.** Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder.
3. —: **BONA FIDE PURCHASER: QUESTION FOR JURY.** In a suit on a promissory note, a peremptory instruction in favor of plaintiff on the ground that the note was purchased from an innocent holder is erroneous, where reasonable men may properly infer from all the facts and circumstances of which there is proof that the holder in making the purchase acted on behalf of plaintiff, who had actual knowledge of valid defenses.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Reversed.*

*J. C. Saylor, John A. Miller and John N. Dryden, for
appellant.*

N. P. McDonald, contra.

ROSE, J.

This is a suit on a promissory note for \$500, dated February 12, 1909, and due October 1, 1909. On the face of the instrument John H. Bearss is payee and John Ericson maker. The Central National Bank of Kearney is plaintiff and John Ericson, John H. Bearss and Frank E. Wilcox are defendants. *Bona fide* transfers for value before maturity without notice of defenses, from Bearss to Wilcox, from Wilcox to the State Bank of Riverdale, and from the latter to plaintiff, are alleged in the petition. For the purposes of review the defenses pleaded by Ericson may be summarized as follows: There was no consideration for the note. With others aggregating \$2,000 it was given to Bearss for a one-sixth interest in a patent right for a five-horse doubletree. With the aid of Wilcox, Bearss falsely represented the article to be a new and workable invention of the value of \$100,000. It would not work and was of no value. Bearss, with the aid of Wilcox, fraudulently induced Ericson to sign the note by falsely representing to him that it contained the words, "given for a patent right on a five-horse doubletree, and void if doubletree fails to work," and, "note to bear 7 per cent. interest when business pays 10 per cent." Ericson is an old man and cannot read without his glasses. He did not have them with him when he signed the note, and did not know what he was signing, but relied upon the false representations of Bearss and Wilcox as to the contents of the note. Before he signed it, they entered into an agreement with him that the notes would not be sold, but would be returned to him, if the patent right did not prove to

be beneficial. That agreement was violated. Plaintiff procured possession of the note with full knowledge of the facts constituting the defenses pleaded. The State Bank of Riverdale was not a purchaser in good faith, but had due notice of the infirmities in the note before it purchased and transferred it. After the parties had adduced their proofs on both sides of the issues raised by the pleadings, the following charge was given: "The court instructs the jury to find for plaintiff on the ground that the Riverdale bank became an innocent purchaser of the note, and plaintiff, through it, became an innocent holder." From a judgment in favor of plaintiff, Ericson has appealed.

The correctness of the peremptory instruction in favor of plaintiff is the controlling question. Since the trial court directed a verdict in favor of plaintiff, it is necessary, in reviewing that ruling, to assume the existence of every material fact which the evidence on behalf of Ericson establishes or tends to prove, and to give him the benefit of proper inferences from such facts. *Nothdurft v. City of Lincoln*, 66 Neb. 434; *Paxton v. State*, 59 Neb. 460; *Harris v. Lincoln Traction Co.*, 78 Neb. 681; *Tate & Ehrhardt v. Loney*, 85 Neb. 559.

The answer alleges, and the evidence tends to show, fraud in the inception of the note. It was incumbent on plaintiff, therefore, in making its case to comply with the following rule of law: Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder. *Wyman v. Searle*, 88 Neb. 26; *Norwood v. Bank of Commerce*, 77 Neb. 205; *Lahrman v. Bauman*, 76 Neb. 846; *Thompson v. West*, 59 Neb. 677; *National Bank of Battle Creek v. Miller*, 51 Neb. 156; *Kelman v. Calhoun*, 43 Neb. 157; *Violet v. Rose*, 39 Neb. 660; *Haggland v. Stuart*, 29 Neb. 69. This feature of the case must also be considered in reviewing the peremptory instruction.

Ericson testified that during the second week in March,

1909, he learned the notes were not drawn according to agreement, and that he then notified all the banks in Kearney, including plaintiff and its cashier, of his defenses, and warned them not to buy the notes; that plaintiff's cashier, in response to the notice, said, "I will not buy them;" that after Ericson had been notified in October, 1909, that the note in suit was in possession of plaintiff, he went into its place of business and inquired of its cashier: "Didn't I notify you last spring not to buy it?" He further testified that the cashier replied: "Yes; I don't want you to have any hard feelings against me. I haven't bought this note. I just took it as collateral from Wilcox. Bearss owed something on a threshing machine and I took them as collateral. If I can't collect from you, I will have to collect out of Wilcox." Other evidence tends to prove: The business of the State Bank of Riverdale is conducted in a little town a few miles from Kearney. Its capital stock is \$5,000. Legally it cannot make an individual loan in excess of \$1,000. It was a correspondent of plaintiff. It kept an account at plaintiff's bank. It bought commercial paper for plaintiff. Though Wilcox transacted business with plaintiff in Kearney at a time when it was buying such paper, he entered into correspondence with the State Bank of Riverdale and offered to sell two of Ericson's notes at a discount. The three notes, aggregating \$2,000, were received by the State Bank of Riverdale March 31, 1909. The same day it sent to Wilcox its draft on plaintiff's bank for \$1,650. A few hours after the purchase it sent the note in suit to plaintiff without making any indorsement thereon, and received credit on its account for the sum paid to Wilcox. The State Bank of Riverdale made no profit on the transaction, but understood in advance that the notes should be sent to plaintiff when purchased from Wilcox. No transaction showing a transfer from Wilcox to the State Bank of Riverdale was entered on its books, nor did the note itself show that the State Bank of Riverdale was a transferee. From all the facts and circumstances of which

there is proof, reasonable men might properly infer that the State Bank of Riverdale acted for plaintiff in purchasing the note in suit, when the latter had full knowledge of the defenses thereto, and that therefore plaintiff was not an innocent holder, as instructed by the trial court. In this view of the testimony the case ought to have been submitted to the jury.

Reasons for this conclusion were recently stated by the supreme court of Iowa as follows: "It is ordinarily to be expected, in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him and made good his claim to be an innocent purchaser is therefore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law." *Arnd v. Aylesworth*, 145 Ia. 185, 29 L. R. A. n. s. 638.

For the error in directing a verdict for plaintiff, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

HAMER, J., dissenting.

I dissent from the views expressed in the majority opin-

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ion upon the ground that there was no offer upon the part of the defendant to prove that the cashier or any officer of the plaintiff bank had any knowledge of the alleged fraudulent inception of the note sued on at the time the same was delivered to the plaintiff. Nor is there sufficient evidence, as it seems to me, to prove any improper purpose upon the part of any officer of the plaintiff.

JOHN S. MOORE, APPELLANT, v. LETTA F. BRITIZUS ET AL.,
APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,815.

Deeds: CANCELCATION: EVIDENCE. In a suit in equity to cancel a deed
as having been procured by undue influence and by promise of
services never performed, decree in favor of defendant affirmed
as being a proper determination of the issues under the evidence.

APPEAL from the district court for Boone county:
JAMES N. PAUL, JUDGE. *Affirmed*.

H. C. Vail, for appellant.

W. L. Rose and W. F. Critchfield, contra.

ROSE, J.

The relief sought by plaintiff is the cancelation of a deed to a quarter-section of land in Boone county. It was executed October 17, 1900, and promptly delivered. Plaintiff was grantor, and his daughter, Letta F. Moore, now Letta F. Britizus, was grantee. At the time he was a widower, 71 years old. He had a number of children, but all were married or absent except grantee, who remained single until she was 30. In 1903 she married and moved to South Dakota. Three years later she went to California, where she still resides. In the deed grantee reserved the right to use and occupy the premises during the remainder of his life, and exercised that right nine years

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before bringing suit. Plaintiff alleged, and attempted to prove, that he was infirm in body and mind, that his daughter unduly influenced him to execute the deed by promising to remain at home with him and to care for him during the remainder of his life, and that she failed to keep her promises. Grantee denied undue influence or fraud, pleaded that the deed was executed for a valuable consideration paid in other lands and in a valid note, and that the condition alleged in the petition was no part of the transaction, though she never refused to provide a home for her father. The trial resulted in a dismissal of the suit, and plaintiff has appealed.

The question presented by the record is: What does equity require under the evidence? After a careful consideration of the proofs of both parties, the conclusion is unanimous that there must be a finding in favor of grantee on all the controverted issues. It follows that the decree below is without error.

AFFIRMED.

NATIONAL ENGRAVING COMPANY, APPELLANT, v. QUEEN CITY LAUNDRY, APPELLEE.

FILED NOVEMBER 13, 1912. No. 16,818.

1. **Trial: FINDINGS BY COURT.** Where an action at law is tried in the district court without a jury, findings of fact have the same force as a verdict.
2. **Parol Evidence: CONTRACT FOR ADVERTISING.** Where a written order for advertising matter shows on its face that it does not contain, the entire contract of the parties, or a description of such matter, oral warranties made by an agent and the use of a sample exhibited by him in procuring the order may, in a proper case, be shown by parol, though the order contains a provision that the principal will not be bound by terms not embodied in the written instrument.
3. **Sales: REFUSAL TO ACCEPT.** Independently of express contract, a purchaser by sample may refuse to receive the goods, when offered, if they fail to correspond to the sample.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

J. W. James, for appellant.

Tibbets, Morey & Fuller, contra.

ROSE, J.

The amount in controversy is \$41.99. At 154 Nassau street, New York, plaintiff was engaged in supplying advertising matter to merchants and others, while defendant was conducting a laundry at Hastings. This is an action to recover the agreed price of advertising matter alleged to have been furnished by plaintiff to defendant under the following contract: "It is agreed that the National Engraving Company will not be held responsible for any provisions not embodied in writing herein, and that this contract cannot be canceled without the written consent of the said company. National Engraving Company, 154 Nassau Street, New York: You are hereby authorized to furnish the undersigned one cut and reading matter weekly for our exclusive use in advertising the laundry business in the city of Hastings, state of Nebraska, only, for a term of not less than one year from commencement of service, and until notified in writing to discontinue same, for which we agree to pay to your order at New York the sum of seventy-five cents and postage for each cut at the end of each calendar month. Interchangeable base will be furnished free to subscriber. Dated Aug. 27, 1907. Queen City Laundry, R. L. Sabin, Mgr."

Plaintiff's claim is composed of 53 weekly items, beginning August 30, 1907, and ending August 29, 1908, each item being: "One cut, reading matter and postage, @ 79c," with 12 cents added to the total for extra postage. The claim was resisted on the ground that an agent for plaintiff, in procuring the order, represented and warranted the advertising matter would be the work of highly skilled artists; that it would be first class and well adapted

to defendant's business; that the cuts offered were cheap and inferior in quality, and did not in any respect comply with the agent's representations and warranties; that the agent in procuring the order displayed a sample of the cuts to be sent to defendant; that the work offered was inferior to the sample; that defendant canceled the order after two or three cuts had been received, returned them, and thereafter refused to accept any more. The action was commenced in the county court and dismissed. Upon appeal to the district court, the case was tried without a jury. There the court found in favor of defendant on all the issues, and from a judgment of dismissal plaintiff has appealed to this court.

The findings below have the same force as a verdict. Plaintiff argues, however, that the evidence is insufficient to sustain the judgment. There is testimony tending to show that, promptly after the first cut was received, defendant wrote a letter to plaintiff, and therein objected to the character of the work and to the advertising matter furnished, intimating that it was not adapted to defendant's business, and saying: "If this is a sample of the class of cuts you are turning out, you may discontinue sending me advertising matter;" that in a reply plaintiff sent another cut, recognized the right of defendant to make objections to the advertising matter furnished, and said: "We are always ready to correct any errors on our part, and in cases where the cut that we send is not suitable, we are always willing to send a new one in its place without additional charge;" that, after receiving three or four of the cuts, defendant returned them, and by letter canceled the order and thereafter refused to accept any more; that those afterward sent were returned by the post office authorities; that plaintiff's agent, in procuring the order, made the representations and warranties pleaded in the answer; that the cuts offered were not made by skilled artists, but were cheap and inferior in character; that the advertising matter was not adapted to defendant's business; that all the work offered and all the cuts

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tendered were inferior to the sample, and not suitable for the purposes for which they were intended. While the testimony adduced by defendant to establish the defenses pleaded is rather weak, and while the qualifications of an expert who testified to the character of the cuts and to the unsuitability of the advertising matter rejected by defendant are not very satisfactory, the judgment below is not without support in the evidence.

To avoid the consequence of the trial court's findings, plaintiff argues that the testimony relating to the agent's warranties and sample should be disregarded, because defendant was bound by the following provision of the order: "It is agreed that the National Engraving Company will not be held responsible for any provision not embodied in writing herein, and that this contract cannot be canceled without the written consent of the said company." The point argued does not seem to be well taken, when the order itself and the interpretation of the parties to it are considered. The order shows on its face that the cut and the reading matter are not described in the contract. What defendant ordered was "one cut and reading matter weekly for our exclusive use in advertising the laundry business" in Hastings. The sample used in procuring the order is not mentioned in the contract. In replying to the letter in which the first advertising matter was condemned by defendant as unfit for that purpose, plaintiff wrote: "We are sending you today a new cut and trust that same will be to your liking. At any time that the cuts don't suit you, write to us and you will always find us ready to suit you in your demand. We can assure you that we shall do our utmost to serve you with the best during the life of the contract." The record, therefore, shows both parties understood that all of the terms of the contract were not inserted in the written instrument. Plaintiff accepted it, and sued for the entire sum due for full performance. The sample shown by the agent and the warranties made by him were instrumentalities employed in procuring the order, and are, under the circumstances of

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this case, binding on the principal, notwithstanding the attempt to confine its agreement to the terms of the written instrument. *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb. 110.

It is a well-established rule that, independently of express contract, a purchaser by sample may refuse to receive the goods when offered, if they fail to correspond to the sample. *Gill v. Kaufman*, 16 Kan. 571; *Keeler v. Paulus Mfg. Co.*, 43 Tex. Civ. App. 555, 96 S. W. 1097; *Washington Hydraulic Press Brick Co. v. Sinnott*, 92 N. Y. Supp. 504.

For the reasons given, the judgment will not be set aside for insufficiency of the evidence.

AFFIRMED.

**WILLIAM SHERRILL ET AL., APPELLEES, v. MARK M. COAD,
APPELLANT.**

FILED NOVEMBER 13, 1912. No. 16,760.

1. **Sales: RESCISSION: RETURN OF PROPERTY.** In order to entitle a vendee of a chattel to a rescission of the contract of purchase, he must allege and prove notice to the vendor of his election to rescind, and a return or an offer to return the property.
2. ———: **FRAUD: MEASURE OF DAMAGES.** In an action by a vendee for damages for a breach of warranty or fraudulent representations by the vendor as to the quality of personal property purchased, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented at the time the representation or warranty was made.
3. ———: **RESCISSION: BREACH OF WARRANTY.** "A sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded." *Mundt v. Simpkins*, 81 Neb. 1.
4. **Fraud: PLEADING.** The petition examined and set out in the opinion, held, insufficient to entitle plaintiffs to recover under either of the rules above announced.

APPEAL from the district court for Dawes county:
JAMES J. HARRINGTON, JUDGE. *Reversed.*

A. W. Crites, W. J. Coad and W. H. Herdman, for appellant.

Justin E. Porter, Andrew M. Morrissey, Allen G. Fisher and William P. Rooney, *contra.*

FAWCETT, J.

From a judgment of the district court for Dawes county, in favor of the plaintiffs, for alleged damages by reason of the purchase of a stallion from defendant, defendant appeals.

The petition alleges that in April, 1907, plaintiffs purchased from defendant a certain stallion for the sum of \$500, under an oral warranty that the horse was a fair, average foal-getter, defendant well knowing that plaintiffs proposed to stand the horse for breeding purposes; that plaintiffs had no knowledge as to the qualities of the horse in that regard, and relied upon defendant's representations and warranty; that upon a trial of the horse for an entire season, under proper care and handling in every respect, the horse proved to be utterly worthless as a breeder, and "has proved of no value whatever for the purpose purchased; that he is not and was not as warranted therein a foal-getter, and that he has proved of no value to the plaintiffs, to their damage in the sum of \$500 in that regard." The petition then alleges that the time of one man was devoted to the care and handling of the horse; that the care, board, feed and nurture of the horse have been wholly lost, and that the fair and reasonable value thereof is the sum of \$600. It is further alleged that plaintiffs' damages accrued through no fault or negligence of their own, but solely through the inherent defects in the horse and through his failure "to come up to the warranty aforesaid." The prayer is for judgment for \$1,100.

"their damages as aforesaid," with interest on \$500 from April 30, 1907, and on \$600 from June 12, 1908. The answer is: First, a plea to the jurisdiction, which need not be considered here; second, it admits the sale and delivery of the horse for the agreed consideration of \$500, "which stallion the said plaintiffs did receive, and have kept to this day," and denies each and every other allegation in the petition. The third averment in the answer relates to the question as to whether the horse was sold upon a written or oral agreement. It is conceded by defendant that, for the purpose of this hearing, that question is foreclosed against him by the verdict of the jury. It, therefore, will not be considered.

At the trial upon these pleadings the court instructed the jury as follows:

"No. 2. The burden of proof is upon the plaintiffs to establish by a preponderance of the evidence, as to the stallion, that they purchased said stallion for breeding purposes, at an agreed price of \$500, and that they paid to defendant the said sum of \$500; * * * that said stallion was entirely worthless for the purpose for which he was sold and purchased, and that the plaintiffs were damaged by reason thereof in the sum of \$500."

"No. 5. The jury are instructed that, if you find in favor of the plaintiffs, then it will be your duty to allow the plaintiffs interest on the \$500, being the purchase price of said stallion, from April 30, 1907, to the first day of this term of court."

"No. 5½. You are instructed that you have nothing to do with the fact as to whether or not the stallion in question would be good for other than breeding purposes. If the plaintiffs bought him for breeding purposes, and he was not of the kind of horse that the defendant warranted him to be in respect to foal-getting, then the plaintiffs are not required in law to keep the horse at his fair value for any other purposes."

It is apparent from a reading of the pleadings, in connection with these instructions, that the judgment of the

district court cannot be sustained. If the action be treated as one for rescission, the petition is clearly insufficient, in that it contains no allegation that plaintiffs ever attempted to rescind the contract, or that they ever returned or offered to return the stallion to defendant. Such an allegation is necessary to sustain an action for rescission. *McCormick Harvesting Machine Co. v. Knoll*, 57 Neb. 790; *Alfree Mfg. Co. v. Grape*, 59 Neb. 777.

If the action be treated as one for damages for a breach of warranty, the measure of plaintiffs' damages would be the difference between the actual market value of the horse at the time of its purchase by plaintiffs and its market value had it been as warranted and represented to him. *McClatchey v. Anderson*, 84 Neb. 783. The court failed to recognize either of these rules in its instructions to the jury, and the verdict returned is in excess of any sum which could be returned under either of such rules. The petition does not allege any offer to return the horse by plaintiffs, nor does it allege that the horse was of no value. The only allegation is that it was valueless for the purpose for which they purchased it. The evidence discloses that, while the horse was valueless as a breeder, plaintiffs had worked him for two or three months; that after the horse was "broke" to harness he was "a very nice buggy horse, was a fine looking individual," and a good coach horse.

It is suggested that the judgment might be sustained on the ground of fraud; and it is argued that defendant's agent at the time of the sale made representations as to the quality of the horse, which were false and therefore fraudulent; but here again the petition is defective in not containing any such averments. Moreover, in *Young v. Filley*, 19 Neb. 543, we held: "In an action for damages for a breach of warranty or fraudulent representations as to the quality of personal property sold, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it

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been as represented at the time the representation or warranty was made." In the opinion by REESE, J., our present chief justice, p. 545, it is said: "It is insisted by defendant in error that the petition alleges both a breach of warranty and fraud, and for the purpose of the case we will assume that such is the fact. In either case, where there is no allegation of a rescission of the contract, the measure of damages is the difference between the value of the corn as it really was at that time and what it would have been worth had it been as represented."

It is also argued that in June, 1908, as soon as the horse was found to be valueless, plaintiffs advised defendant of such fact, and that such notice was a waiver of any claim of necessity of a tender. Upon this point also the petition is silent.

In support of their claim for \$600 for the care, keeping and handling of the horse during the season following their purchase, which it may be conceded was necessary to demonstrate whether or not he was as warranted, plaintiffs contend that "it seems to be the general rule in cases of breach of warranty for special purposes, etc., the damages should be such as may fairly and reasonably be considered rising naturally, that is, according to the usual course of things from the breach, or such as may be reasonably supposed to have been within the contemplation of the parties at the time, as the probable result of the breach." Upon this point we said in *Mundt v. Simpkins*, 81 Neb. 1: "A sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded." Plaintiffs have not brought themselves within this rule by claiming a rescission and offering to restore the horse.

For the reasons above outlined, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HAMER, J., dissenting.

I am unable to agree with my associates in this case. I start out with the legal proposition that misrepresentation, deception and fraud in the sale of personal property resulting in damages to the vendee, if shown by competent evidence, will support a judgment in his favor whether the action be only for a breach of warranty or for fraud and deceit. Under the application of the rule stated, the evidence in this case is clearly sufficient to sustain the judgment of the trial court. The stallion in this case was sold purely for a breeder. The agent of Coad, Mr. Hall, in order to induce the purchase, said to the plaintiffs, "You can't lose nothing buying this horse. We will guarantee him. We know him to be a breeder. We have two or three colts out of him now down at Mr. Coad's ranch at Fremont." He also presented to plaintiffs a printed circular describing the horse as "Bay Billy, by W. J. Bryan, 2389, foaled May 1, 1901; he by Kadris, 284; dam, Queen, Hambletonian Mare; Bay Billy is a fine five-year-old coach stallion. He comes of good lineage, and is worthy of all good things that can be said of him, and has proved a sure foal-getter in our hands." Mr. Hall knew that these representations were false. He knew that there were no colts at the ranch from this horse, or anywhere else. There could be no case containing a greater amount of deceit than this case. The purchasers desired a good breeder and sure foal-getter. The defendant's agent told them that that was just what they were getting. To get such a horse the plaintiffs paid \$500 in cash. They employed a man to take care of the horse. They were put to the expense of \$600 in taking care of him. If I understand this court aright, it determines that the plaintiffs shall find Coad, if they can, and "tender" to him the horse in question; that is, they shall have a halter on the horse, and shall send him up and down the country accompanied by a caretaker until they can find Coad, and then, having the horse with them, they are to

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offer him the halter strap so that he may lead the horse away. There was no contention concerning the fact that \$500 had been paid as the price of the horse by the plaintiffs, and there was no serious contention but that it cost the plaintiffs \$600 to keep him until the suit was brought.

It certainly is not debatable that, if Coad told the plaintiffs, or either of them, that he would not receive the horse back, that of itself would relieve the plaintiffs from attempting to return him. What was said on this subject? The parties met at Chadron. Coad was there in one of his other stallion cases. Sherrill told Coad that the horse would not breed. On cross-examination Coad admitted this talk. Coad was told by Sherrill that he could have the horse back. On cross-examination Sherrill testified: "Q. When was that? A. Why, since I have been in Chadron. Q. Who was present? A. He and Mr. Hall and Muzzey." This conversation happened at Chadron. It is not denied. In order to render the majority opinion, the other members of the court seem to shut their eyes to these facts. They do that or they ignore them. At that time the horse was at Crawford, only 28 miles distant from Chadron. Coad could not have meant by what he said anything except that *he would not receive the horse back*. Second. But, if there is any doubt upon this question, it is forever settled by the fact that Coad *answered* setting up the alleged fact that there was a bargain to the effect that, if the horse turned out *not* to be a sure foal-getter, he was to be returned to Coad at Fremont, and that Coad was to furnish the plaintiffs another stallion that would be a sure foal-getter. When Coad makes this defense, how can it reasonably be contended that Coad would receive the horse back if it was offered to him? Coad tenaciously hung on to this defense until the jury determined it against him. Why should the majority of the court refuse to listen to the evidence which determines this stubborn fact beyond all question?

Where a party intentionally and by deceit produces a false impression in order to mislead another, or to entrap

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him, or to obtain an undue advantage over him, it is then a case of positive fraud in the true sense of the term. In every case where there is positive fraud, the man who perpetrates the fraud is entitled to no standing. *McCready v. Phillips*, 56 Neb. 446. Coad is no more entitled to protection against the deceitful act perpetrated, than was the criminal who "gold-bricked" a prominent banker from the central part of this state a few years ago, or Mabry and his gang, who "confided" victims from all classes and from all parts of the United States. Coad by his answer said: "I will not take the stallion back and give you your money. You can bring me the stallion, but you must take another stallion in place of him. I keep your money." In the face of Mr. Coad's contention, how can there be any doubt about it? No man who practices a "confidence game," and by the deception of an unsuspecting and innocent person, and without other consideration except the use of *some instrument* as the basis of such deception, should be permitted to successfully interpose the well-intentioned forms of the law adapted to ordinary commercial transactions as a shield to ill-gotten fruits of his iniquity, and such instrument, whether of a trifling or substantial value, is not entitled to special consideration at the hands of the court. Courts are in some instances called upon to lend their aid to a skillful and unprincipled wrongdoer who uses the form of the law to accomplish his wicked purpose. In *Graffam v. Burgess*, 117 U. S. 180, 186, Mr. Justice Bradley, delivering the opinion of the court, said: "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest form of law."

It is a mistake for the majority to rule that the plaintiffs shall not be allowed to recover for the injury that has been done to them through the deception practiced upon them by the defendant Coad and his agent, Hall. It

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is the impractical nature of the majority opinion which makes men look askance at a "legal decision." The difficulty with the majority opinion would seem to be that it fails to take notice that there may be *three or more* things instead of *two*. If I may use the illustration, the opinion is along the line that all wagons must be red wagons or green ones, while I think there are no good objections to wagons of other colors. It is an idea of ancient legal learning that there can only be two suits in this class of cases; one to recover for the injury done—claimed to be the difference between the true value of the thing sold and its sale price—and the other, to recover back the price paid for the article sold, based upon a rescission of the sale. Under the first theory, the purchaser must keep the article which he was *deceived* into purchasing. He is bound to keep it, although he never intended to buy, and would not have bought it if he had known the actual facts surrounding it, and though induced by deception to make the purchase, he *must* sue for the *difference* in value between what it is actually worth and the sale price. The other idea is that, before there can be a recovery, there must be a rescission of the contract. I maintain that this doctrine is obsolete in all cases of wilful fraud and deception. The majority opinion is not justified by common sense as applied to business. It is a contention for overtechnical nicety. It would have done great credit to the period of 200 years ago. I am trying to make the contention that the law is something to which common sense—just ordinary business sense—may be applied, just as it may be applied to other occupations, to farming, to surgery, and to merchandizing. The great danger is that the application of the law is likely to be unnecessarily mixed with a tincture of fictitious and far-fetched learning that is, or ought to be, obsolete. In this case the purchase was clearly brought about by the misrepresentation of Hall, the agent of the defendant, Coad. What he said was wholly false. There were no colts from the horse at Fremont. The horse was unable to get foals. Hall and

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Coad knew that. Coad comes into this court and asks this court to lay down the doctrine that, notwithstanding the deception which he practiced upon the purchasers, *they are bound to keep the horse for whatever he is worth*, although they did not buy him for *any other purpose* than to be a foal-getter, and he is absolutely worthless for that purpose; or, they are bound to find Coad, wherever he may be, and to "tender" the horse back. And they are bound to do this, although Coad has said that he would *not* take the horse back, and has made a long and strenuous contention attempting to prove that there was to be an exchange of stallions if the horse turned out not to be a foal-getter, and has been beaten. The majority opinion imposes upon the plaintiffs the burden of hunting up Coad, who was always a difficult man to find because he was continually going from one end of the state to the other, besides making trips into Wyoming, Colorado and Chicago. Under the majority opinion, the plaintiffs are to be forever burdened with taking the horse along with them from one end of the state to the other looking for Coad. They are always to have the horse on hand to offer him to Coad. The thing proposed to be done is impracticable and wholly unbusinesslike.

The pleadings and facts allege and show deception. The plaintiffs were defrauded out of the \$500 that they paid for the horse, and they were compelled to keep the horse about a year before they could know that he was not a breeder, and that he was sterile and wholly without capacity as a breeder. The plaintiffs have lost the money which they expended in keeping the horse. It is the idea of the writer that, when the deception is alleged and proved, the plaintiffs ought to be allowed the damage that they have suffered by reason of such deception, and that it is immaterial whether they tender back the instrument used to deceive or to accomplish the deceit intended. The plaintiffs have not refused to give Coad his horse. Coad never demanded the horse. Besides they have told him that he could have the horse.

The effect of the majority opinion is to offer a premium for the practice of deception, and that premium is that the purchasers shall be compelled to keep the horse in any event if the seller, by *any sort* of misrepresentation and fraud to the purchaser, gets the horse delivered to the man he deceives. Suppose the case of one who is "gold-bricked." Suppose that by deception the swindler gets out of the purchaser \$5,000 for his gold brick, and the purchaser is fortunate enough to discover the deception, and he finds the man who has deceived him, and sues him to recover the \$5,000 out of which he has been defrauded. Then, suppose the defendant coolly meets the plaintiff with the proposition that the brick was actually worth \$7.50; that the actual brass, copper and lead contained in it were of the value of \$7.50; and then insists that there was no offer to return the brick, and he objects to the plaintiff's right of action on the ground that there has been no "tender" to him of the brick. There is no difference in principle in the actual case and the case supposed. This case is the same as any other case where confidence men secure victims by misrepresentation. It is time that our courts refused to coddle confidence men who secure victims by selling stallions that are known not to be breeders, or by selling gold bricks, or by promoting sham prize fights and sham races, after the manner of the Mabry gang. There is no good reason why the judgment of the district court should not stand. It is the judgment of a practical business judge who is a good lawyer and 12 practical business men and farmers who sat on the jury.

Section 92 of the code provides what the petition must contain: "First. The name of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant. Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. Third. A demand of the relief to which the party supposes himself entitled." The provisions of the code touching the contents of the petition permit any statement of facts to be

made which constitute the cause of action, and no form of language is required, and there is no restriction except that the story is to be told without repetition. The language used is "ordinary language." We make the point that any statement complying with the code, as above quoted, and that demands relief and is supported by sufficient evidence entitles the litigant to recover. Section 90 of the code specifically provides that the rules of pleading heretofore existing in civil actions are abolished, and that the forms and rules by which the sufficiency of a pleading is to be determined are only such forms and rules as are "prescribed by this code." There is, therefore, no reason whatever to go to any of the old forms. The pleader is simply to tell his story, and if that story is sufficient, and is supported by the evidence, then he is entitled to the relief which his story gives him. There is nothing in our code touching the pleadings in this case which compels the use of a particular form for a breach of warranty or deceit. If the "law" demands something that is not in the code, then I demand that this court shall change what it calls the "law," because there is nothing that requires this court to stand by an ancient, inappropriate, and obsolete doctrine which has been legislated out of existence. The defendant asks this court to protect him in the practice of his deception. He asks that the mode used shall be after the manner of an ox wagon or a donkey's cart, when there are carriages, beautiful horses and automobiles all about.

In *Martin v. Hutton*, 90 Neb. 34, defendant falsely represented to the plaintiff that a certain quarter section of land was not subject to entry because of a homestead filing thereon, and that he (Hutton) would secure a relinquishment of that filing for \$2 an acre, or \$320 all told. Hutton received the money from the plaintiff. There was no consideration for the payment of the money, because the land was all the time subject to entry, and Hutton obtained it from the plaintiff by fraud. In a suit by the plaintiff to recover the money back, the defendant

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seems to have contended that the plaintiff, as a condition precedent to prosecuting the action, was required to rescind the contract. The plaintiff lived on the land. Hutton wanted him to give it up. He made the same contention Coad does, only Coad says there was no rescission of the contract, and that the horse was not tendered back to him. The contention was overruled, and there was judgment for the plaintiff for the full amount of money out of which the defendant had defrauded him.

In *Warder, Bushnell & Glossner Co. v. Myers*, 70 Neb. 15, the plaintiff undertook to repair a harvesting machine so that it would do good work, and, if it did not do good work, it was to be taken back by the plaintiff and the defendant's note surrendered. In a suit upon the note, where the defendant answered that there was a failure to repair and furnish such a machine as was agreed upon, the plaintiff objected that it was nowhere alleged in the answer that there was an offer to return the machine and rescind the contract, or any demand for the return of the note, or any notice to the plaintiff. This court said that an allegation of notice and rescission of the contract was not necessary in order to tender a valid defense, and that "the plaintiff undertook affirmatively, under the agreement, to repair the machine and to put it in good working order, or take it back and return the defendant's note. This it failed to do, and, until it had complied with the terms of the agreement, it had no cause of action on the note, the consideration of which, because of its neglect and refusal to put the machine in good working order, had, by reason thereof, failed. It was not a question of rescission of contract, but of compliance with its terms on the part of the plaintiff, in order to entitle it to a recovery on the note sued on." Applying the doctrine to the instant case, the defendant would have had no cause of action if he had brought suit upon the note given for the purchase price of the horse, and simply because he did not furnish a stallion such as he had agreed to furnish—a stallion with the breeding power to get colts

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—and neither does the defendant have any defense, for the same reason.

In *Murray v. Mann*, 2 Exch. (Eng.) *538, the agent sold a horse, very much as the agent in the instant case. The agent took the horse back and refunded the purchaser the money which he had paid. If Hall had taken the stallion back and had repaid the plaintiffs the purchase price, there would have been a still stronger similarity between the cases. If Hall and the plaintiffs had together endeavored to trade back, they could have been met by the principal, Coad, with the proposition that they had no right to trade back, and that was the proposition with which the principal in the English case met his agent, the livery stable keeper. *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598, and *Eames v. Morgan*, 37 Ill. 260, seem to justify the contention I am making. Coad's evidence admits the deception.

CHARLES W. MOLINE, APPELLANT, v. EVA CHARLOTTA CARLSON; JOHN J. JOHNSON, EXECUTOR, ET AL., APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,860.

1. **Specific Performance: PAROL CONTRACTS.** The rule is now well settled in this court that a parol contract will be enforced by a court of equity where one party has wholly and the other partly performed it, and its non-fulfillment on the one hand would amount to a fraud upon the party who has fully performed it.
2. —: **AGREEMENT TO DEVISE: DEFENSE BY HEIRS.** Where a husband and wife take into their family the infant child of a stranger, and either then or subsequently they jointly orally agree that, if such child will remain with them during their lives and render them faithful and obedient service as a child, they will, at their death, by will or otherwise, leave him all of the estate of which they die seized, *held*, that the statute as to homesteads cannot be pleaded by the heirs of either the husband or wife as a defense to a suit by such child for the enforcement of the parol contract.
3. **Contracts: EVIDENCE.** The evidence examined and set out in the

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opinion, held, that the parol contract in this case possessed the elements of certainty, and the proof establishing it is sufficiently clear and satisfactory.

APPEAL from the district court for Saunders county:
GEORGE F. CORCORAN, JUDGE. *Reversed with directions.*

C. Petrus Peterson and Charles H. Slama, for appellant.

B. E. Hendricks and Simpson & Simpson, contra.

FAWCETT, J.

This suit was instituted in the district court for Saunders county to quiet title to the east half of the northwest quarter and the north half of the northeast quarter of the southwest quarter of section 25, township 14, range 8, in said county. The decree quieted plaintiff's title to an undivided one-half interest in the land, and dismissed the suit as to the other half. Plaintiff appeals.

Plaintiff relies upon a parol contract, which he sets out as follows: "That on September 1, 1896, and at many divers times prior and subsequent to said day, said Peter A. Carlson and his wife, the defendant Eva Charlotta Carlson, orally promised that, in consideration of the plaintiff's services and of the plaintiff remaining with them on their farm until said Carlson's death, they would leave to plaintiff, by will or otherwise, all of said Carlson's estate of which he would die seized, and that plaintiff would be made Carlson's residuary legatee; that in consideration of said promises, and relying thereon, the plaintiff yielded to the request and agreed thereto; that he refused to go with his own father, that he sacrificed all other opportunities for his own advancement, and remained with the said Peter A. Carlson, serving and obeying said Carlson in all his wishes and desires, and rendered unto said Peter A. Carlson full and faithful service in implicit reliance upon the said oral agreement; that pursuant thereto said Peter A. Carlson did execute a will

conforming to said agreement; but that thereafter said Peter A. Carlson wrongfully executed another will giving plaintiff the sum of only \$400." The petition also alleges that the land belonged to Carlson in his lifetime; that Carlson died March 24, 1909; and that defendant Johnson is the duly qualified executor of the will of said Carlson, deceased.

The defendant Eva Charlotta Carlson entered her voluntary appearance in the suit, and filed her answer, in which she admits all the allegations contained in and consents to the prayer of the petition; and further alleges "that this action is brought with her consent and to satisfy her wish and desire that the agreement between this defendant's lamented husband and the plaintiff may, in justice and equity, be fulfilled, so plaintiff will be the sole residuary heir of Peter A. Carlson, deceased."

The heirs of Peter A. Carlson being all nonresidents of Saunders county and unknown to plaintiff, service was had upon them by order of the court, in accordance with the provisions of the statute in such case made and provided. After disposing of certain motions and demurrers, which we deem it unnecessary to refer to, Ida Sofia Ahlen filed her separate answer, alleging that said Carlson left as his only heirs at law and next of kin Eva Charlotta Carlson, his widow, Carl W. Carlson, a brother, and John Emil Larson, a nephew, and Ida Sofia Ahlen (herself) a niece, the last two being children of a deceased sister of said Peter A. Carlson. She further admits the death of Carlson; the appointment of Johnson as executor; that Eva Charlotta Carlson is the widow of deceased; the ownership of the land by Carlson prior to his decease; and that plaintiff has resided upon the premises as tenant of said Carlson for several years last past; alleges the execution of the last will of Carlson; that the same had been duly admitted to probate (attaching a copy of the will to her answer); alleges that Carlson and his wife resided upon the land as their home; that neither of them during said time owned or possessed any other lands,

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houses or town lots; and that the real estate in controversy was the home and homestead of Carlson and his wife; and denies every other allegation. The will attached to her answer devised the lands to the widow for her life, bequeathed \$400 to plaintiff, and all the rest and residue of his property, share and share alike, to his legal heirs. The answer of defendant Johnson, executor, is substantially the same as that filed by defendant Ahlen.

Carl W. Carlson first appeared especially, objecting to the jurisdiction of the court over him, which objection was overruled. He thereupon answered separately; his answer in all essentials being similar to the answer of defendant Ahlen. John Emil Larson, the nephew referred to in the answers of Mrs. Ahlen and Carl W. Carlson, made no appearance.

The reply to the three answers above set out denies all allegations of such answers, except such as admit allegations in plaintiff's petition.

The decree found that, under the pleadings and answer of defendant Eva Charlotta Carlson, plaintiff is entitled to judgment against her; finds all the allegations of the three answers above set out to be true; and that as to said defendants and each of them the plaintiff has no cause of action; finds that the land in controversy was in September, 1896, occupied by Carlson and his wife as their homestead; that the same constituted their homestead at all times thereafter until the death of Peter A. Carlson; that the value of the lands in September, 1896, was \$3,000; adjudged that the plaintiff is the owner of an undivided one-half of the lands, "being such interest only as the defendant Eva Charlotta Carlson had in said lands as the widow of Peter A. Carlson, deceased;" quieted in plaintiff title to such half interest, subject to any rights the executor may have for the payment of debts and expenses of administration; that as to the defendants, other than Eva Charlotta Carlson, plaintiff's action be dismissed.

The issues presented for our consideration are stated in

the brief for appellees as follows: "First. Was any oral contract entered into between Peter A. Carlson, the testator, and the appellant herein, whereby Carlson obligated himself to convey the land described in the petition to the appellant, either by will or otherwise? Second. Was the land owned by Peter A. Carlson at all times his family homestead, and not subject to his individual disposal?"

The first question is not accurately stated. It is not alleged that Carlson agreed to convey "the land described in the petition." The allegation is that he agreed to "leave to plaintiff, by will or otherwise, all of said Carlson's estate of which he should die seized." As thus modified, the question must be answered in the affirmative.

The defendant Mrs. Carlson testified, substantially, as follows: "I am 88 years old. I have lived in Saunders county about 35 years. * * * We have lived on this farm over 20 years. My husband and I had four children, but they are all dead. My oldest daughter had one child, a boy, but he died when he was two months old. All my children have been dead many years. My oldest daughter's little boy died about 16 years ago. Anyway, Charlie Moline is my son. He was four years old when he came to us. He is married and has got six children. He has lived on this farm since he was four years old. He has been in this place always until now, and I hope he will stay here too. His mother was dead, and his father asked us to take him, and I say, 'Well, if I can be mother for him I will, I don't want to take him if I cannot be like a mother.' My husband, Mr. Carlson, was there and heard that talk, and he wanted to do that too; both of us wanted to take the boy. Mr. Carlson said: 'We'll do the best we can for the little child,' and Carlson said he wanted to take him for his son. He said he would take him for his boy, and we say: 'He shall come to us and stay with us forever, and afterwards he can attend to us while we be old,' and at that time it was said that all our property should belong to Charlie Moline after

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we died. Then Charlie came to live with us, and we do all we can for him, and he do everything he could do to help us. We send him to school, and he done what he could, and as he grew older he act all right, he work on the farm, and he been all right. My husband and Charlie they talk about the farm many time after Charlie got older, and when Charlie was 16 years old Carlson promised him for sure that Charlie was to have the farm. They had a talk in our house when Charlie was about 16 years old, and then Carlson promised Charlie for sure that he would get the farm. When my husband told Charlie that Charlie should have the farm, I was willing. It was all right with me. I was willing then, and I am willing now, to let him have every bit. Of course, you know, I want my board so long I live. I do not know how long I live, and then it goes to him. No child could be a better child than Charlie have been to me. My husband tell Charlie many times that he should have the farm. I couldn't tell how many times he told him, but many, many times, and he never say anything different." On cross-examination she testified: "We send him to school and clothe him. He never needed a doctor for he hardly be sick. We gave him a little spending money, a little bit, a quarter of a dollar. We furnish him clothes and treat him kindly. Yes; Mr. Carlson and Charlie had some trouble. It was pretty hard to get along with Carlson. He was hard on me, I hate to talk about it. Sometimes Carlson and Charlie didn't get along well because Carlson was drunk, and then he hardly know what he do. Once Carlson was going to choke Charlie when he was drunk, and Charlie pushed him away. They quarrel two times. They weren't friendly towards each other. Once Charlie went to see his father. I tell him to go and see him. He stay about a week. Charlie and I were friendly; he called me 'mother.' Mr. Carlson and Charlie wasn't so friendly. Mr. Carlson was sorry when Charlie was away. He said: 'I be glad if Charlie come back.' Carlson scolded Charlie and he scold me, but when Charlie was away Carlson was so

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angry. 'I wish Charlie come back, I wish he come,' he say. * * * Once Carlson and I went to Wahoo, and he made a will for Charlie; he had a will drawn, and he showed it to Charlie, and afterwards Charlie said, 'You better keep the will, papa, for maybe you take better care of it than I do.' He kept this will about a year. I don't know just how long, but a year, and then Carlson burnt the will up one time when he got drunk. * * * I knew that Carlson had a brother and had a sister, but she died and left two children. I don't know anything about them. I don't know if they live or not. Charlie don't know anything about them, and he didn't know where they are. I never had anything to do with those people, never. Carlson used to write to them. 'He write a letter, and William hardly answer him, so he didn't get much love for him.' Carlson didn't write to his sister's daughter, he didn't know where she lived. He tried to find out, but couldn't. Charlie comes to see me often; he come in the morning, and he come in the noon, and he come in the evening; he comes every day. Oh, he be so kind to me. I want him to have everything. We rented the farm to Charlie since he has grown up. He pays us \$300 rent; he paid that always." Redirect. "Q. How did it happen, what made the bad feeling between Mr. Carlson and Charlie? A. The brandy. Q. And who used the brandy? A. Carlson; Charlie never, and that is why I love him for, for I hate brandy; I pour many tears for it. When I sign the paper in this case it was my free will. I hope and pray God you do the best you can for me and Charlie. You know what you done for Charlie you done for me and for his poor little children."

The witness A. F. Johnson testified, substantially: "I am 70 years old, and now live at Mead; have lived there about 6 years. Before that I lived on a farm 4 miles from Peter A. Carlson's farm. Carlson and I visited back and forth a good deal. I was well acquainted with Carlson; I knew him since we were 18 years old. * * * Mr. Carlson and I talked about his farm and about Charlie

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Moline. I remember that talk. It is a pretty long time ago. It must be 13 or 14 years ago. The talk was right in his house. He called me and my wife to come down there for dinner, and after dinner we go into the front room and sit down, and then he says to me, 'There is something I want to talk to you and let you know.' 'Well,' he say, 'my wife and I have agreed to promise Charlie Moline the farm and everything what we have after we is dead, and he have promised us to stay here and take care of us; he have done that before and he have promised to do that after this, so we want to make up a will for him;' and I say, 'Do you want to do that you might do that pretty quick;' and he say, 'Well, I want to talk about that before you so you know what we want to do. I am outside a good many times, and I do not know what some can help me if I may die before we make up the will, so you hear that now, you can witness that.' I remember this well. I also remember that the boy was about four years old when he was taken into the Carlson home."

The witness Reim testified that he was the assessor. "I called at Mr. Carlson's home to assess him; we talked about one thing and another, and he finally got to telling me that he received a letter from Charlie's father; that he wanted the boy back; and Carlson told me that he had made agreements now with Charlie and his father that if he stays until the old folks were dead that everything that was theirs, real and personal, was Charlie's."

The witness Baur testified that Carlson traded with him in his store; that on one occasion "we got to talking, and he told me his whole life story, how he had to go through life, and how he struggled; and, as he was coughing pretty heavy, I says, 'It's about time, old man, you prepare for death,' and one thing brought on another, and he said he has got it pretty nice and everything is all right, and I asked him who would get all the stuff he left behind, and he says, 'All is Charlie's, Charlie Moline;' he told me at one time that Charlie Moline took care of his things, and that in case something should happen that he gets his estate."

The witness Okeson testified that he had been acquainted with Carlson for 24 years; that he did work on Carlson's new house about 9 or 10 years ago; that, "while walking with Mr. Carlson on the road by his farm and near Frank Halsted's place—Mr. Halsted was married to Mr. Carlson's daughter at one time—I said to Mr. Carlson, 'Well, some times when you die Frank will come after some of your property,' and Mr. Carlson he said, 'No, everything that would be after me and my wife that will fall to Carl;' that is Carl Moline, the plaintiff; Mrs. Halsted, Carlson's daughter, had died long before that time, about 10 years before."

Five other witnesses testify to statements made by Carlson of quite similar import. It is also shown that, when plaintiff married, Carlson built a cottage on the farm, into which he and Mrs. Carlson moved, and in which they lived until the death of Mr. Carlson, and that plaintiff, with his wife, resided in the old house. Carlson and his wife retained about five acres for a garden, and plaintiff tilled the farm, paying Carlson \$300 a year rent therefor. During all of the years that plaintiff worked upon the farm, up to the time of his marriage, he never received wages of any kind for his services. Every act and statement of Carlson's during the nearly 30 years of plaintiff's association with him, except the making of the last will, clearly indicate that the relations existing between him and his wife on the one side and plaintiff on the other were as claimed by plaintiff.

It is hard to see how a stronger case could be made in support of a parol agreement of the kind alleged in this case. To our minds the evidence is clear and satisfactory to the effect that Mr. and Mrs. Carlson made the agreement set out in plaintiff's petition, and that plaintiff fully performed his part of the contract. The fact that Mr. Carlson in his later years became addicted to the use of strong drink, and that while intoxicated he quarreled with the plaintiff, for no other reason, as appears from the record, except that plaintiff interfered in behalf of his

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foster mother, affords no justification for a breach of the contract on the part of the deceased. Plaintiff was taken into their home when he was little more than a babe, under an assurance then made by the deceased and his wife that upon their death he should have all of their estate, and when, at the age of about 16 years, his father desired to have the boy return to him, the Carlsons again expressly agreed that, if he would remain with them until their death, he should have all of the estate. Acting under that agreement, plaintiff did not return to his father, but remained with the Carlsons and performed every duty faithfully and well. Upon this point there is no evidence to the contrary. We hold, therefore, that the contract alleged in the plaintiff's petition is fully proved.

That a parol contract of the kind set out in plaintiff's petition will be enforced where the making of the contract is sustained by clear and satisfactory proof is now so well settled in this state as to no longer require reference to our former decisions upon that point.

This brings us to the second point, viz.: "Was the land owned by Peter A. Carlson at all times his family homestead, and not subject to his individual disposal?" Upon this branch of the case counsel for defendants rely upon *Teske v. Dittberner*, 70 Neb. 544, and *Lichty v. Beale*, 75 Neb. 770. We do not think either of the cases cited is a bar to a recovery in this suit. *Lichty v. Beale* is not in point. In the *Dittberner* case the oral agreement was that the son Carl was to remain upon the particular premises in controversy, pay the taxes, keep up the place and improve it, and provide a home, board, clothing and spending money for the said Frederick Teske and his wife so long as they should live. If either the said Frederick Teske or his wife should desire to leave the home to be provided by plaintiff, then they were to receive \$100 each per year in lieu of the above provisions relative to their support. In considering that contract, the court was of the opinion that it was governed by section 4, ch. 36, Comp. St. 1901, entitled "Homesteads." The difference between

that case and the one at bar is marked. The effect of the oral contract in that case was that the parents presently parted with the control of their homestead, and, instead of the son living with and serving and caring for them in their own home until their death, he was to provide a home for them; while in the case at bar no limitations whatever were put upon the right of Carlson and his wife to occupy, sell and convey, or encumber their homestead in any manner they saw fit. Their only contract was that, in consideration for the services rendered by plaintiff, he should have whatever estate remained after their death.

It will be seen, therefore, that this case does not come within the purview of section 4, *supra*, but that it is controlled by section 17, ch. 36, *supra*, which provides: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will." In the light of this statute, there can be no doubt but that, if Carlson, at the time he made the oral contract relied upon, had executed his will, devising to plaintiff all of the estate, real and personal, of which he might die seized, subject to the life estate of his wife, the will would have been valid, and could not have been assailed by any one after his death. If he could have lawfully made a will thus disposing of his property, then he could lawfully contract to make such a will, and his heirs would have no more standing in court to plead the statute as to homesteads as a defense to an action to enforce the contract than they would have to plead the same statute if the suit were based upon such a will. By the parol contract, which we have already held is established by clear and satisfactory proof, Mr. Carlson did not attempt to convey or encumber his homestead, or to defeat his wife of her life estate as his surviving spouse, if she became such. He simply agreed to do that which the section of our statutes above

quoted shows he had a legal right to do; and, having executed a will leaving his estate to persons other than the plaintiff, he has broken his contract, and plaintiff is entitled to the relief prayed. In addition to all this, it appears from the record before us that at the time Carlson made the contract, and at the time of his death, there was no one dependent upon him for support, except his wife, who joined with him in the oral contract, and who now insists upon its performance. She was the only person, except Carlson himself, who had any right of homestead, and this right she has expressly waived and relinquished by her answer in this case.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a decree quieting plaintiff's title in and to the lands in controversy, subject only to the debts, if any, of Peter A. Carlson and Eva Charlotta Carlson, and the costs of administration; the costs of the suit to be taxed against the defendants Ida Sofia Ahlen and Carl W. Carlson.

REVERSED.

INTERNATIONAL TEXT-BOOK COMPANY, APPELLANT, v.
WILLIAM H. MARTIN, APPELLEE.

FILED NOVEMBER 13, 1912. No. 17,382.

1. **Former Opinion Affirmed.** Our former opinion, reported in 82 Neb. 403, re-examined and adhered to.
2. **Instruction of the trial court, considered in the opinion, held erroneous,** in that it is not based upon any competent testimony.
3. **Contracts: BREACH: EVIDENCE.** Evidence examined and referred to in the opinion, *held* insufficient to sustain the judgment.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed with directions.*

Hull & Bishop and David A. Harrington, for appellant.

McGraw & Wilke, contra.

FAWCETT, J.

This case is before us a second time. Our opinion upon the former hearing may be found in 82 Neb. 403. For a statement of the controversy reference is made to that opinion. It is sufficient, for the purpose of this opinion, to state that plaintiff conducts a correspondence school; that defendant entered into a contract with it to take its course of instruction in electrical engineering, for which he was to pay \$78 in monthly payments of \$2, less 10 per cent., and plus \$1 for a transfer fee; that he continued his monthly payments until he had paid about \$50, when he ceased making such payments, and subsequently notified the agent of plaintiff that he did not intend to carry out the contract. The books and papers necessary to commence his studies were sent to him by plaintiff, and we gather from his testimony that they are still in the box in which they were shipped to him. However that may be, he never entered upon the studies.

Upon the former hearing we held that the district court erred in instructing the jury that, if plaintiff was entitled to a verdict, the measure of its recovery would be the loss of its profit on its contract, plus the value of the services it had rendered defendant. The reason given for our holding was: "It will be observed that plaintiff has not been in default in any particular in performing, so far as defendant would permit it to perform, the contract; that its undertaking is to continue its course of instruction until it has educated defendant to such a degree of proficiency as to entitle him to a diploma. No one can logically establish the period during which its teachers must send out questions and correct answers given by defendant in response thereto. The evidence indicates that plaintiff employs nearly 400 teachers, and the addition or loss of one student would hardly increase or diminish plaintiff's expense to any perceptible degree. The contract is entire, and, upon defendant's refusal to perform, and subsequent to the maturity of all of the monthly

payments, plaintiff ought to recover the consideration defendant agreed to pay it, unless defendant can show some facts that reasonably and definitely tend to mitigate plaintiff's damages." Upon the last trial in the district court, evidently influenced by the last clause of the last sentence above quoted, the court again instructed the jury that, if they should find from the evidence that the cost to plaintiff of fulfilling its contract amounts to more than the balance due from defendant on his contract, then their verdict should be for the defendant. Construing the clause from our former opinion, to which attention has been directed, to mean what the trial court evidently construed it to mean, still this instruction should not have been given, for the reason that defendant utterly failed to show by any competent evidence any "facts that reasonably and definitely tend to mitigate plaintiff's damages."

The only evidence offered upon that point is the testimony of Professor Stout, of the University of Nebraska, and Mr. Penny, an assistant in the office of the state superintendent. Professor Stout testified as follows: "Q. Do you know anything about the nature of the papers usually sent out by correspondence schools * * * in teaching electrical engineering? A. I do not recall that I have ever seen any of the electrical engineering papers. Q. Do you know the usual papers sent out to students, the class of paper, the style of questions asked, the amount of questions asked as a general thing in the papers sent out by correspondence to those students? A. Taking the question on a general basis that way, I would say that I do not know. My observation is limited to comparatively few papers. Q. Do you know how long it takes a competent person to examine the answers sent to questions asked in one of those papers? A. For an unqualified answer, I think I would have to answer no." On cross-examination, his testimony was: "I meet classes day after day in the higher branch of civil engineering. I have nothing to do with electrical engineering at all. My experience is based on the four-years' course of instruc-

tion in engineering leading to the degree of civil engineer. I have had no experience at all in correspondence schools, never taught in one, and do not know about the expense of running such a school, except as I should estimate it in comparison with my work in the university. * * * I do not know anything about the International Text-Book Company so far as their equipment and number of instructors is concerned, nor anything about the cost with which they handle the students. I don't know anything about what it costs them to handle the students of electrical engineering. * * * Q. The point is, you don't know anything about their facilities for teaching electrical engineering? A. Putting the question that way, I think my answer would be, no, I don't. I do not know the number of instructors they have in the electrical engineering, what they pay, nor how many students an instructor can attend to." Mr. Penny, upon cross-examination, testified: "I do not know anything about the cost of instruction per student in electrical engineering at the International Text-Book Company school at Scranton, nor anything about the teaching or administrative force of that school, nor anything about the expense of operating that school per student in electrical engineering at any time. Where a school makes a business of teaching by correspondence and is organized on that basis, I have no experience as to the cost per student for electrical engineering." Counsel for plaintiff moved to strike out the testimony of these witnesses. His motion was overruled. In this ruling the district court erred. Their own testimony clearly shows their incompetency. Indeed, we are unable to see how any witness could have been found who could testify to any facts which, as stated by Judge ROOT, would "definitely tend to mitigate plaintiff's damages."

In 2 Sedgwick, Damages (9th ed.) sec. 612, it is said: "In some cases the plaintiff may recover the whole contract price. A common case is that of a schoolmaster. If a scholar is removed from the school during the quarter,

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the schoolmaster may recover the tuition fee for the whole quarter (citing cases). * * * The principle upon which these cases rest seems to be that the whole contract price is to be given, because it is impossible to show with the required certainty any pecuniary outlay which the plaintiff has been saved by the breach. The school must continue in session, with its entire corps of instructors, although a scholar is withdrawn. * * * If, in such a case, the plaintiff is put to the same expense in time and money as if he had fully performed, the contract price of the whole work is the measure of damages." This reasoning exactly fits the case at bar.

After having examined two records made by the parties in this case, we are unable to discover any theory upon which defendant can escape his liability to plaintiff for the balance due under his contract. The contract is entire. Plaintiff has at all times been ready, and is still ready, and willing to carry out its part. Defendant has shown no good reason why he should not do the same. The litigation should end. The judgment of the district court is therefore reversed and the cause remanded, with directions to that court to enter judgment in favor of the plaintiff for \$22.50, with interest from the time of the commencement of the suit in that court.

REVERSED.

WILLIAM BOYD, SR., APPELLEE, V. LINCOLN & NORTHWESTERN RAILROAD COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 13, 1912. No. 16,468.

OPINION on motion for rehearing of case reported in 89 Neb. 840. *Rehearing denied.*

SEDGWICK, J.

A statement of the issues in the case may be found in our former opinion, 89 Neb. 840. In the argument upon the motion for rehearing the question discussed was

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whether the grades of the defendant company caused the overflow on the plaintiff's land, and in determining this question it was thought that the principal, if not substantially the only, question involved was whether the water at the time the damage was caused was substantially higher on the south side than on the north side of the grade, so much so as to justify the conclusion that this grade must have caused the overflow on the plaintiff's land. The parties have submitted memoranda briefs upon this point. They have quoted the evidence from the record bearing upon it, with references to the record, and to the exhibits showing the elevations at the grade, and at the plaintiff's land and other points. While the evidence is quite voluminous, it must be conceded that upon the points so presented it is unsatisfactory and in some respects conflicting. It is impracticable to present an analysis of this testimony, and, while we might not have reached the conclusion of the jury, we cannot see that there is not sufficient substantial evidence in this record to support their verdict. The motion for rehearing is therefore

OVERRULED.

BARNES, J., dissents.

NELLIE F. MEISNER, APPELLANT, v. DORA HILL ET AL.,
APPELLEES.

FILED NOVEMBER 13, 1912. No. 16,611.

1. **Homestead.** Our statute uses the term "homestead" in its commonly accepted meaning—the house and land where the family dwells.
2. ———: **RIGHTS OF CREDITORS.** The homestead is subject to execution sale upon judgments against the holder of the title if its value exceeds \$2,000. This limitation is solely for the purpose of fixing the rights of the homestead claimants and the creditors, respectively.
3. ———: **DESCENT.** If the legal title to the homestead is in the

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husband, and there are no claims of his creditors against it, upon his death the homestead vests in the widow for life, without regard to its value, and in the absence of a will of the husband his heirs take the homestead subject to the life estate of the widow. *Tyson v. Tyson*, 71 Neb. 438, overruled.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Reversed with directions.*

E. C. Calkins and H. F. Rose, for appellant.

John J. Sullivan and Fred W. Ashton, contra.

SEDGWICK, J.

George Meisner died intestate. The plaintiff is his widow and the defendants are his children by a former wife. Fourteen years before his death he had selected the northwest quarter of a section of land in Buffalo county as his family homestead, which at the time of his death was worth about \$100 an acre, and built a residence thereon of about the value of \$9,000. At the time of his death he owned other land adjoining the said quarter section, and other property of the value of more than a half million dollars. The plaintiff and the defendants by agreement made a division of the real estate, except the said quarter section of land. The plaintiff contended that she was entitled to the quarter section of land selected as their home and dwelling-house and improvements thereon during her life. The defendants contended that, as the home property was of greater value than \$2,000, they were entitled to have it sold and the proceeds in excess of \$2,000 divided among the heirs of the deceased. The parties then entered into an agreement to submit this question to the district court. The terms of their agreement were set out in writing at full length and signed by the parties, but afterwards, for some reason, the defendants declined to voluntarily submit the matter to the district court, insisting that the county court, and not the district court, had jurisdiction thereof, and the

plaintiff then brought this action in the district court asking that court to determine that the said quarter section of land "descended to this plaintiff for and during the term of her natural life," and asking for general equitable relief. The answer admitted the facts as above stated, denied the jurisdiction of the district court, and alleged "that the property descended to the defendants subject to the homestead right of the plaintiff to the extent of \$2,000 for life." The court decreed that the plaintiff's interest in the premises "be limited to the right to the use of \$2,000 for and during her natural life, the present value of which is the said sum of \$1,464; and that she be forever barred and restrained from claiming any further or greater homestead interest therein." The plaintiff appealed.

Considering the importance and necessary discussion of the principal question involved, we conclude that the district court was the proper forum without discussion. This conclusion is justified, we think, by our former decisions.

What is a homestead? Is it the present worth of the exemption which the statute allows against the claims of creditors, or is it the family home? Section 6 of the present homestead law (Comp. St. 1911, ch. 36) requires a creditor, when he seeks to subject a homestead to the payment of his claim, to take an oath "that the value of the homestead exceeds the amount of the homestead exemption." This is a legislative declaration that the homestead is something more than, and different from, the \$2,000 exemption against the claims of creditors. This distinction plainly runs through all of our legislation. It is emphatically presented in substantially the same words in sections 8 and 11 of the act.

The first territorial legislature adopted laws from the state of Iowa that fill about 100 pages of the published laws of that session. Among other subjects, it included the subject of execution and exemptions of property. After exempting public property from sale upon execu-

tion, section 478 (1 Complete Session Laws, p. 36) specifies certain articles of personal property exempt to private individuals, and section 479 provided: "If the debtor is the head of a family there is further exempt—his homestead as provided by law." That is all that is said about the homestead, and then follows specifications of other articles of personal property that shall be exempt. There was no attempt to define "homestead." The word was used in its general acceptation—the home of the family, the common law castle of the citizen. The question of value did not enter into its description. The poor and the rich were treated alike; no one was to be deprived of his home. At the same session of the territorial legislature an independent act was passed providing that the property of married women, owned by them before marriage, should be exempt from their husband's debts. 1 Complete Session Laws, p. 83. The next session of the territorial legislature enacted a general law "respecting practice and proceedings in courts of justice." This law embraces the subject of executions and exemption from sale thereon. 1 Complete Session Laws, p. 341. It contains the same language in regard to the homestead as the former act, exempting it without regard to value. It was not necessary to define it; evidently the commonly accepted definition was adopted. "Homestead" was well defined at the common law. Webster's New International Dictionary defines it as "the land and buildings thereon occupied by the owner as a home for himself and his family, if any, and more or less protected by law from the claims of creditors." Bouvier's Law Dictionary adopts the definition from the supreme court of New Hampshire: "The home place—the place where the home is. It is the home; the house and the adjoining land; where the head of the family dwells; the home farm." If a tract of land is purchased by the parties for a home, and is transferred to one of them accordingly, and is by them in good faith occupied as their home residence, the land so transferred to them, and dwelling-house and other improvements

placed thereon, become their homestead. The Revised Statutes of 1866 treated the subject of homestead and exemption under that title. Section 525 provides: "A homestead, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated town, city or village, or, instead thereof, at the option of the owner, a quantity of contiguous land, not exceeding in amount two lots, being within an incorporated town, city or village, and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of the territory, being the head of a family, shall not be subject to attachment, levy or sale, upon execution or any other process issuing out of any court within this territory, so long as the same shall be owned and occupied by the debtor as such homestead," with the proviso that the "homestead mansion," and 20 acres of land whereon the mansion is situated, and not in any corporate town, city, or village, shall be exempt, and land adjoining the mansion not exceeding \$500 should also be exempt, thus defining the homestead and exempting it absolutely. The next session of the legislature amended the act so as to exempt the homestead "so long as the same shall be owned and occupied by the debtor as such homestead." 2 Complete Session Laws, p. 376. By the act of 1873 the homestead was made liable to sale upon the foreclosure of a mortgage "duly executed by the head or heads of the family." 2 Complete Session Laws, p. 711.

By the act of 1875 the exemption of the homestead was continued, with a proviso that the homestead and appurtenances so exempted from forced sale "shall not exceed \$2,000 in value" (laws 1875, p. 45, sec. 1), and providing in the sixth section of the act that, if the homestead consists of a house and lot which will not bear division without manifest injury, and the "fair and reasonable rent for the same" will be more than \$300 annually, such excess of rental must be paid by the debtor annually until

the debt is paid. Section 19 of the act of February 19, 1877, provides: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law." Laws 1877, p. 37. This is a very suggestive section. That part of the homestead which the creditor might take is clearly not considered the whole homestead, and when one spouse dies the other might occupy the whole homestead, unless the creditors interfere. This is the first provision for the descent of the homestead upon the death of the spouse who holds the legal title. It specifies clearly the homestead that so descends, and it is the "whole homestead," and not merely the value exempted from the claims of creditors.

In 1879 our present statute was enacted. Laws 1879, p. 57. The first section of this act provides that a homestead not exceeding in value \$2,000, including the dwelling-house in which the claimant resides, etc., shall be exempt from judgment liens and from execution or forced sale. This section does not attempt to define what a homestead shall be. Its object is to continue the exemption from the claims of creditors and limit that exemption. Section 17 of the act continues the provision for the descent of the homestead. It enlarges the brief provision of section 19 of the previous act. The survivor now takes the title and possession for life, instead of the mere right of occupancy. The heirs of the deceased are declared to inherit the homestead, subject to the life estate of the surviving spouse, just as they would inherit other property of the deceased. The life estate of the surviving spouse and the inheritance of the heirs of the deceased are protected against "any debt or liability contracted by or existing against" the deceased spouse prior to his or her death, "except such as exists or has been created under the provisions of this chapter." This last clause, of course, refers to mechanic's lien, mortgages, and the claims of creditors. It is still the "whole homestead" that descends. Taxes, liens, mortgages, and claims of creditors, if they exist, may inter-

fere with the enjoyment of it, but it is not measured by such claims. The distinction between the homestead and the amount of the homestead exemption is preserved all through the statute, though in some few instances the language is indefinite. This distinction, as already stated, is especially made manifest in our present statute. We could not consistently require a citizen to swear that the value of the homestead exceeds the homestead exemption if the two are identical. If the homestead in which the surviving spouse is to have a life estate is the present worth of the amount exempted from the claims of creditors, then it could not be true that the homestead exceeds the exemption.

The whole body of our legislation upon the subject of homestead so manifestly shows what it is intended shall be the home that descends to the surviving spouse for life that repetition may be justifiable in considering the course of the legislation. Our first legislation upon the subject recognized the existence and importance of the home as it was then identified, and preserved it for the family against all claims of creditors. The same action was taken in the next legislation upon the subject. The next legislation describes the homestead as the "homestead mansion" and 20 acres of land whereon the mansion is situated, together with adjoining land of the value of \$500. The homestead thus defined was absolutely exempt. The next legislation limited the exemption "so long as the same shall be owned and occupied by the debtor as such homestead." The next legislation allowed the homestead to be incumbered by a mortgage "duly executed by the head or heads of a family," and made it liable to sale upon the foreclosure of such security, but otherwise left it absolutely exempt so long as owned or occupied as a home. And, then, in the act of 1875, the \$2,000 limitation on the exemption was introduced into the law of the state, but the legislature was careful to preserve the identity of the homestead as the family home, and provided a way by which the family might keep and occupy the home

against any claims of creditors. There is reason for preventing the investment of all one has in an excessively valuable homestead for the purpose of defrauding creditors. The same reasons do not exist for taking the home away from the surviving spouse for the benefit of adult heirs, still less in the interests of minor heirs who are ordinarily more benefited by preserving the family home intact. The statute provides an elaborate method for creditors in the former case, but provides no means of dividing the homestead between the heirs and the surviving spouse. This fact of itself strongly indicates that the legislature never contemplated such a division. This \$2,000 limitation of the exemption against the creditors has since that time been continued in our legislation, but no statute has ever declared that the limitation in favor of creditors is the full measure of the home that the surviving spouse may occupy for life, or that the present value of the use of \$2,000 for the life of the surviving spouse shall be equivalent to a home.

Next comes the act of 1877, by which the surviving spouse is given the "whole homestead" for life, unless "otherwise disposed of according to law;" that is, unless sold for taxes or for mortgage foreclosure or affected by the statute in regard to claims of creditors. This provision of the act of 1877 is continued in the seventeenth section of the act of the next legislature, which is our present law, as already suggested.

When the whole history of our legislation upon the subject is considered, there is no ground for supposing that the legislature intended that, when there were no debts, mortgages or other liens, anything less than the "whole homestead" should vest in the surviving spouse for life. There has never been any legislation that would justify the conclusion that, when the husband and wife had established a home and occupied it for years, and the one in whose name the legal title was placed should die, and the home should be of greater value than the present worth of the use of \$2,000 for the life of the survivor, the

home must be sold and the proceeds divided among the heirs, and the surviving spouse must seek another home. Such legislation would be monstrous, and our lawmakers cannot be charged with it. Indeed, the present act itself repels such a conclusion. The first section does not define the homestead; it merely declares how much of it shall be exempt from the claims of creditors. The sixth section declares that creditors shall not interfere with the homestead without first swearing that it exceeds in value the homestead exemption, and the seventeenth section declares that the homestead shall vest in the survivor for life, subject only to specified liens.

It is said that the husband holding the legal title may incumber the homestead by confessing judgment, and so compel its sale. And, also, that, when husband and wife have joined in such a conveyance, the proceeds are at the disposal of the owner of the homestead title, and only \$2,000 of the proceeds is exempt from levy by creditors; but a court of equity would enjoin the sale upon a judgment fraudulently confessed, and there can be no sale of a homestead without the consent of both husband and wife, which might depend upon the proposed disposition of the proceeds. In *Tyson v. Tyson*, 71 Neb. 438, it is decided that, "in a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and \$2,000 in value." And in *Teske v. Dittberner*, 70 Neb. 544, *Meek v. Lange*, 65 Neb. 783, and *Wardell v. Wardell*, 71 Neb. 774, and other cases, in some of which perhaps the precise point was not involved, similar expressions have been used. The legal profession and the people of the state are entitled to know the construction that this court intends to put upon important statutes of this nature. It is with exceeding reluctance that we refuse to follow the earlier decisions. This is particularly true when the rule announced in such earlier decisions has become the rule of property. Indeed, it is generally considered that in such cases it is better

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to abide by a wrong construction, and leave the remedy with the legislature, than to confuse the decisions of the court upon important questions. The decision in *Tyson v. Tyson*, *supra*, however, has not become a rule of property in the full meaning of that expression. The homestead estate which vests in the surviving spouse for life is an ephemeral estate. It dies with the holder of it, and in most cases its life is short. At the end of the life estate in the homestead, the heirs of the deceased holder of the legal title take the property precisely as they do any real estate not of a homestead character, with the exception that it is not, in their hands, liable, for debts of their ancestor, for which it could not have been liable in his or her lifetime. Therefore no permanent real estate title depends upon the homestead of the surviving spouse. The case of *Teske v. Dittberner*, *supra*, was three times considered by this court, and was very much discussed. The question in the case was whether the holder of the legal title could "make a testamentary disposition of the property in question, subject to the inchoate life estate therein of his wife," and it was held, after much discussion, as stated in the opinion (65 Neb. 167), that the right to so dispose of the property "is expressly preserved to him by the statute." We have no fault to find with this conclusion. The question as to what constitutes "the inchoate life estate therein of his wife" was not discussed in any of the opinions, but was assumed, and we are now convinced erroneously, to be only that portion of the homestead which the law exempts as against the claims of creditors. Upon this vital question, then, the case is not to be deemed authoritative. In *Meek v. Lange*, 65 Neb. 783, the question presented, as stated in the opinion, was "whether or not damages for loss of the bargain can be recovered against one who, without the assent of his wife, makes an executory contract for the sale of his family homestead, which the wife subsequently refuses to carry out." It was held that no recovery could be had "for the loss of the bargain." It was said: "Possibly

the plaintiff is entitled to nominal damages for the absolute refusal to convey any of the premises, as they were found to be worth more than \$4,000. The homestead right evidently does not protect defendant as to more than \$2,000 worth." In this case, also; the character and quality of the family homestead as determining the life estate of the surviving spouse were not necessarily involved in the point decided, and were not necessary to the disposition of the case. The decisions of this court as affecting directly or indirectly the question here presented have not been exactly uniform. In *Teske v. Dittberner*, 70 Neb. 544, 556, it was said: "In so far as this court has heretofore expressed itself regarding the scope and effect of our homestead statute, its decisions have generally been favorable to a liberal construction of the act, such as would grant the fullest measure of protection to the rights and interests of the homestead claimants. * * * 'The law proceeds upon the theory that both husband and wife are entitled to the benefit of the homestead act, and this right cannot be waived except by the consent of both.' *Bonorden & Ranck v. Kriz*, 13 Neb. 121; *Aultman & Taylor Co. v. Jenkins*, 19 Neb. 209. It is held in *Swift v. Dewey*, 20 Neb. 107, that a mortgage of a tract of land including a homestead, executed by a married man without the concurrence and signature of the wife, is invalid for the purpose of impairing, dismembering, or in any manner affecting such homestead or its appurtenances. To the same effect is *McCreery v. Schaffer*, 26 Neb. 173." Many other decisions of this court, more or less inconsistent with the present contentions of the defendants, are quoted from with approval. In *Clarke v. Koenig*, 36 Neb. 572, *Larson v. Butts*, 22 Neb. 370, and subsequent cases, it is held that a contract for the sale of a homestead will not be specifically enforced unless executed by both husband and wife, and when the purchaser is willing to accept that part of the real estate which exceeds \$2,000 in value as a compliance with his contract, and this without regard to the value of the homestead.

Commenting upon the various decisions of this court upon the subject of homestead, the brief of appellant well says: "If it be true that the lands and tenements comprising the homestead, in so far as they exceed the pecuniary value of \$2,000, are not intended to be afforded any protection or privilege by the homestead act, upon what ground, then, can the court justify its previous holdings that a sale or conveyance of such lands and tenements, when not signed and acknowledged by both husband and wife, is absolutely void, without regard to the circumstance that the value greatly exceeds \$2,000? How, then, may the court justify its holdings that the executor or administrator, upon whom the right of possession of all real estate devolves by a specific provision of the decedent act, cannot dispossess the surviving husband or wife of the land previously occupied as the homestead? How, then, may the court justify its previous holdings that the sale of the homestead property under an ordinary execution is absolutely void, notwithstanding the most formal order of approval and confirmation by the district court? If the term 'homestead,' used in the act, implies in every instance a limitation of pecuniary value of \$2,000, then, necessarily, the excess value of the land and tenements beyond that limitation cannot be afforded any measure of protection. Under such interpretation, a conveyance by deed or mortgage of the lands and tenements comprising the family abode, which are of the admitted value of \$10,000, would not, in so far as it operated upon the excess valuation of \$8,000, affect in any manner the statutory homestead. In such case, the mortgage of the owner, in which the spouse did not join, would necessarily be valid as to \$8,000, and, if the amount of the mortgage covered no more than the overplus or excess value, it would be valid and enforceable in its entirety."

We conclude therefore that the decision in *Tyson v. Tyson*, *supra*, and similar expressions affecting rights between the surviving spouse and the heirs in *Teske v. Dittberner*, 70 Neb. 544, *Meek v. Lange*, 65 Neb. 783, and

Wardell v. Wardell, 71 Neb. 774, and other cases, ought to be overruled. This decision does not affect former holdings of this court in regard to the rights of creditors against homestead property.

The judgment of the district court is reversed and the cause remanded, with instruction to enter a decree in harmony with the views expressed in this opinion.

REVERSED.

HAMER, J., concurring.

On or about the 2d day of March, 1909, George Meisner died intestate in Buffalo county, Nebraska, leaving a widow, and the defendants who are his children by a former marriage. At the time of his death he owned a section of land near Shelton, in that county, 36-10-13, on the northwest quarter of which he and his wife then resided in a dwelling-house stipulated to be of the value of \$8,000. They had lived together on this particular quarter about 14 years immediately prior to his death, and this quarter and the dwelling-house are claimed as the family homestead. The land, exclusive of the dwelling-house, is claimed to have been worth \$100 an acre. In addition to this particular section, George Meisner owned many sections in the vicinity, and his estate was worth more than a million dollars. By a voluntary agreement the widow and the heirs made partition of all the real property belonging to said estate except the home place; that is, the northwest quarter of 36-10-13. The widow contended that she was entitled to the use of the dwelling for life, with so much of the land upon which it was situated as was necessary and appropriate for the reasonable enjoyment of the same as a home. The other heirs contended that the dwelling itself was of greater value than \$2,000, and that they were entitled to have the same sold, and that, after paying the widow the present value of a life estate in \$2,000, they were entitled to have the remainder divided among the heirs. Mrs. Meisner and the heirs entered into an agreement for the submission of the ques-

tion in dispute to the district court and for the disposition of the said home place according to their rights as they might be determined by said court. A suit was brought in the district court for Buffalo county, in which a judgment was rendered to the effect that, the home place being worth more than \$2,000, the homestead right of the widow was limited to the use during her lifetime of the sum of \$2,000 in money. By the judgment the present value of Mrs. Meisner's interest was found to be \$1,464. The pleadings and an agreement made between the parties state the facts.

The district court found and decreed: "(1) That the plaintiff has a homestead interest in the premises described in the petition; but that said interest is limited to the use for life of the sum of \$2,000. (2) That the present value of the homestead interest in said property is the sum of \$1,464. It is further ordered and decreed that the plaintiff's homestead interest in the premises in the petition mentioned be limited to the right to the use of \$2,000 for and during her natural life, the present value of which is the said sum of \$1,464; and that she be forever barred and restrained from claiming any further or greater homestead interest therein." The plaintiff excepted to so much of said finding and decree as limited her homestead right to the sum of \$2,000, and appealed to this court from the judgment rendered.

Whether there is a succession to the surviving spouse implied by the word "homestead" in the present act of 1879 is the question to be determined. We will begin with the consideration of the homestead act of 1879. Laws 1879, p. 57. Section 17 of that act reads: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, *in the survivor for life*, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, *except the life estate of the survivor, by will*. In either case it is not subject to the payment of any debt or lia-

bility contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." The foregoing denies the power of the decedent to dispose of "the life estate of the survivor." The homestead selected from the separate property of either husband or wife vests "in the survivor for life." Afterwards it vests in the heirs of the husband or wife from whose property it has been selected. The homestead coming from the separate property of either the husband or wife vests "in the survivor for life." Section 4 of the act provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by *both husband and wife*." This is substantially a reproduction of the substance of section 3 in the act of 1877, hereafter referred to and discussed. Seemingly the purpose of the legislature by the enactment of these sections was to protect the person who is once married from losing his or her home by any action of the spouse, or by any action of the creditors of the spouse. This may give a very substantial effect to the *succession of the homestead right* to the "survivor for life."

The first legislation on the subject of the homestead in Nebraska was in 1860, when the legislature passed an act contained in 1 Complete Session Laws, p. 648. It is also in Revised Statutes 1866, sec. 525, p. 484. "A homestead, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated town, city, or village, or, instead thereof, at the option of the owner, a quantity of contiguous land, not exceeding in amount two lots, being within an incorporated town, city, or village, and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of the territory, being the head of a family, shall not be subject to attachment, levy, or

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sale, upon execution or any other process issuing out of any court within this territory, so long as the same shall be owned and occupied by the debtor as such homestead. This section shall be deemed and construed to exempt such homestead in the manner aforesaid during the time it shall be occupied by any one or more of the *family* of the debtor, or by the *widow* or minor child or children of any deceased person who was, when living, entitled to the benefit of this subdivision; provided, that the homestead mansion and 20 acres of land whereon the mansion is situate, and land adjoining the same to the extent of \$500 in value, all being without an incorporated town, city, or village, shall be exempted, and no more." Here is a homestead exempted as against creditors for the use of the family, and the widow or minor child of any deceased person who was entitled to the benefit of the provision may occupy the land *without any limit as to time*, because the time is "the time it shall be occupied" by any one of the persons named, and they are determined by the act to be the family.

In *Dorrington v. Myers*, 11 Neb. 388, the head of the family was a widower. This court said: "When as the head of a family he entered into possession of this homestead, he became vested, so to speak, of a homestead estate therein, which was alienable only by sale or abandonment." If this be true, then the occupant mentioned could continue indefinitely to occupy the place. This court said in the case cited: "Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law."

It will be noticed that the homestead provided for by section 525 of the code of 1866 had *no specific value*. It was a place to live. There was a limit to the value of the land adjoining the first 20 acres on which the mansion stood, but the "homestead mansion" and the 20 acres

upon which the same stood *might* be of any value. It was not in the beginning an *exemption* of money, it was an exemption of a *place to live*. In the body of the section it is said: "This section shall be deemed and construed to exempt such homestead in the manner aforesaid during the time it shall be occupied by any one or more of the family of the debtor, or by the widow or minor child or children of any deceased person who was, when living, entitled to the benefit of this subdivision." Here is the matter of occupation that is to be protected, and it applies to "any one" of the family of the debtor, or to his widow or minor child, or to the child or minor children of any deceased person who was, when living, entitled to the benefit of the act.

The act of 1860 was still in force on the 24th of June, 1867, when it was amended by the legislature. The amendment made section 525 of the code of civil procedure of the Revised Statutes of 1866 read: "A homestead, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in any incorporated city or village, or, instead thereof, at the option of the owner, a quantity of contiguous land not exceeding two lots, being within an incorporated town, city, or village, * * * or in lieu of the above, a lot or parcel of contiguous land not exceeding 20 acres, being within the limits of an incorporated town, city, or village, the said parcel or lot of land not being laid off into streets, blocks, and lots, owned and occupied by any resident of the state, being the head of a family, shall not be subject to attachment, levy, or sale upon execution or other process issuing out of any court in the state so long as the same shall be owned and occupied by the debtor as such homestead. This section shall be deemed and construed to exempt such homestead in the manner aforesaid, as well *after* as *before* the death of the debtor, and in the event of the death of the debtor the estate in such homestead shall de-

scend to and be vested in his heirs at law or legatees, free and divested from all claims if (of) any creditors thereto." 2 Complete Session Laws, p. 376. The section as amended at that time refers to land and dwelling-house and appurtenances being a place to live, and *says nothing of valuation*. It contains an amendment which seems quite important. It is: "This section shall be deemed and construed to exempt such homestead in the manner aforesaid, as well after as before the death of the debtor, and in the event of the death of the debtor the estate in such homestead shall descend to and be vested in his heirs at law or legatees, free and divested from all claims if (of) any creditors thereto." This section 525 of the code of civil procedure as amended still remained the law of the state at the time of the publication of the General Statutes of Nebraska of 1873. This act as amended continues the homestead exemption absolutely regardless of the value of the property exempted. The original act of 1860 refers to the dwelling-house as the homestead mansion. As the law was left after it was amended June 24, 1867, the homestead was exempt without regard to its value, and it descended to the heirs divested of any claim of any creditor. The law continued in this way until the 25th of February, 1875, when a new act was passed. 2 Complete Session Laws, p. 843. It will be seen that for 15 years there was in Nebraska a homestead law for the benefit of the family which contained no provision whatever concerning the value of the property exempted. It might be \$5,000, or \$10,000, or any other sum of money.

By the act of February 25, 1875, there came into existence for the first time that provision that the homestead should not exceed \$2,000 in value. It reads as follows: "The family homestead of each head of a family, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, shall be exempt from attachment, levy, or sale upon execution or other process issuing out of any court in the state, so long as the same shall be owned and oc-

cupied by the debtor as such homestead; *provided*, that such homestead and appurtenances situated thereon shall not exceed \$2,000 in value; *provided*, that such exemption shall not apply to homesteads which have been heretofore, or which may be hereafter, mortgaged by the owners thereof." 2 Complete Session Laws, p. 843. Section 1 as above quoted was amended February 13, 1877, to read as follows: "That section one (1) of an act entitled 'An act to exempt the homestead of families from attachment, levy, or sale, upon execution or other process issuing out of any court in the state of Nebraska,' approved February 25, 1875, be amended to read as follows: Section 1. The family homestead of each head of a family, consisting of any quantity of land not exceeding 160 acres, and the dwelling-house thereon and its appurtenances, shall be exempt from attachment, levy, or sale, upon execution or other process issuing out of any court in the state, so long as the same shall be owned and occupied by the debtor as such homestead; *provided*, that such homestead and appurtenances situated thereon shall not exceed \$2,000 in value." On the 19th of February, 1877, the homestead law was again amended and re-enacted. 2 Complete Session Laws, p. 933.

The act of 1875 heretofore mentioned was repealed by the act of 1879, along with the act of 1877, and it is the act of 1879 which remains to be discussed. In all the statutes referred to in which there is a limitation upon the exemption of \$2,000, it is *against creditors*, and not against the survivor. The failure to express the same limitation upon the succession would seem to indicate that it was *not* the intention of the legislative body to impose this limitation in the matter of succession. The legislature has very carefully provided for a means to subject the excess of the value of the homestead above \$2,000 to the payment of any judgment that may be rendered. Nothing is said about a \$2,000 homestead. It is just simply a homestead to which "the survivor for life" succeeds. If the legislature had intended that only

\$2,000 should go to the surviving husband or wife, and that any excess above that should go to the other heirs, why should it not have said so? In the event that the homestead is above \$2,000 in value, it is not saved at all as against the heirs, but \$2,000 in money is saved as a *homestead exemption*. It is a different homestead that is contemplated by section 17 of the act of 1879. That is a homestead to which the survivor succeeds when the husband or wife dies. It is to furnish the home for the family. It is to include the shelter which protects those who are members of the family. The courts should establish a beneficent rule by which the widow and the children, when the husband dies, will be left in the home, and, after the children are grown up, the widow should be permitted to remain in the old home where she has resided with her husband, and which she has perhaps faithfully helped to earn and save. There is no reasonable excuse for cutting down the interest of the homestead succession which should go to the *widow* and provide for her a home during her declining years. The widow ought to be permitted to live in the same house which she and her husband have occupied together, and she ought not to be punished because the bread-winner is dead.

Section 1, ch. 49, laws 1907, enacts: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance * * * shall descend subject to * * * the rights of homestead." It would seem that there is no conflict between this statute covering the succession of heirs of descendants and the law of 1879 relating to homesteads. The statute is intended as a complete protection to the family against the right of arbitrary domination by the husband or wife who happens to hold the title to the homestead estate. This is the direct provision of section 4 of the act of 1879, and the same idea was fully expressed in section 3 of the act of 1877. Section 4 of the act of 1879 reads: "The homestead of a married person cannot be conveyed or encumbered unless the instrument

by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." Laws 1879, p. 58. Section 3 of the act of 1877 reads: "A conveyance or encumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." Laws 1877, p. 34. The homestead act of 1877 protects the *homestead exemption* from the creditor to the extent of \$2,000, and it protects the *homestead itself* from the improvident act of the owner of the legal title.

This record does not involve the rights of the creditors. It deals with the rights of inheritance of the heirs at law as against the widow. In *Galligher v. Smiley*, 28 Neb. 189, Chief Justice REESE, delivering the opinion of this court, said: "In its inception a homestead is a parcel of land on which the family resides, and which is to them a home." In *Palmer v. Sawyer*, 74 Neb. 108, the definition of Judge REESE was quoted with approval.

In *Palmer v. Sawyer*, *supra*, this court held that the man who had acquired a homestead estate during the subsistence of a family relationship was entitled to occupy the premises after the family relationship had been broken up by death and removal. In that case Albert Palmer purchased the land in controversy in the year 1898, and at that time was a widower with three minor children living with him upon the premises. One of the children died and two moved away, so that the father was left alone in the possession and occupancy of the premises. A judgment was rendered against him, and an execution was levied on the land, and there was a proceeding to enjoin the sale. The question to be determined was whether the plaintiff was entitled to claim the property as his homestead. The court held the "head of the family" to include "every person who has residing on the premises with him or her, and under his care and maintenance, either: (1) His or her minor child, or the minor child of his or her deceased wife or husband." This court then recites section 17, and in connection with the two

provisions so recited say: "It will be noticed that the provisions of these statutes reserve the homestead right to every person who is the head of a family as defined in section 15, whether married or unmarried at the time of the acquisition. When the homestead right is acquired by a married person, it cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife, under section 4." The court cite *Whitlock v. Gosson*, 35 Neb. 829, and say that this section of the statute was declared to make the conveyance of a homestead executed by the husband alone void, not only void as to the interest of the wife, but also as to the interest of the husband who executed it. When a homestead right is acquired, it can only be divested in the manner prescribed by statute. This principle is supported by a line of decisions of this court cited in the opinion, and has been subsequently followed in *Giles v. Miller*, 36 Neb. 346; *Clarke v. Koenig*, 36 Neb. 572; *Violet v. Rose*, 39 Neb. 660; *Havemeyer v. Dahn*, 48 Neb. 536. If the homestead in controversy had been selected from the lands of the deceased wife, on the death of the wife, the homestead right would have descended to the husband for life, whether any children had been born of the marriage or not. In *Dorrington v. Myers*, 11 Neb. 388, this court said: "Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead or the protection of the exemption law." In *Gallicher v. Smiley*, *supra*, the court held that the homestead right was beyond the reach of execution. In the above case, REESE, C. J., in the body of the opinion, says: "At the time this homestead right was acquired, by a compliance with the provisions of the law, the whole of the tract now in dispute was exempt from sale so long as its occupancy continued. While the judgments were liens, for the payment of which (if not allowed to become dor-

mant) the property was pledged, yet the homestead character could not be molested for the purpose of enforcing their payment. * * * The right could not be diminished by law without the consent of defendants. *McHugh v. Smiley*, 17 Neb. 620, 626; *DeWitt v. Sewing Machine Co.*, 17 Neb. 533. For twenty years perhaps, and during the whole time of the existence of the indebtedness, the right could not be questioned. The land was included within the corporate limits of the city by law, and without the consent or procurement of defendant. His rights could not be diminished thereby." *Bassett v. Messner*, 30 Tex. 604; *Nolan v. Reed*, 38 Tex. 425; *Barber v. Rorabeck*, 36 Mich. 399; *Ham v. Santa Rosa Bank*, 62 Cal. 125. In *Galligher v. Smiley*, *supra*, a 70-acre tract of land occupied as a homestead was brought within the city of Omaha by the extension of the city limits, and was attempted to be sold under execution. It was held that the homestead character of the land could not be changed without the consent of the occupant, and that the land could not be sold, although worth \$200,000.

Except where it is narrowed by the qualification implied by the term "exemption," the word "homestead" is used in the act of 1879 in its popular sense to designate a *parcel of land on which the family resides*. The section under consideration enables the creditor to reach the *surplus* above \$2,000. That section, therefore, is for the *benefit of the creditor*, as well as for the benefit of the head of the family who claims the "homestead exemption." It would seem that a consideration of the entire act makes it clear that the legislature intended the limitation of value to apply only in favor of creditors, and not to a homestead succession to the heirs or devisees. The court is authorized, on the petition of the creditor, to order a sale by execution only when the land "exceeds in value the amount of the homestead exemption," and prohibits the receiving of any bid "unless it *exceeds* the amount of the homestead exemption." *There can be no sale unless there is such excess*. By section 12 the sum to

be paid the claimant, where the whole tract is actually sold, is designated as "the amount of the *homestead exemption*." In five subsequent sections of this same act of 1879 the limitation of pecuniary value of the homestead is six times referred to as the "*homestead exemption*." These references apply in favor of creditors only. These terms are not applied in connection with the words heirs or devisees. Sections 4 and 17 substantially re-enact the provisions of the act of 1877. Section 4 protects the homestead and the family of a married person against the domination of a husband or wife who is seized of the record title. The legislative policy implied has no necessary relation to the *separate* policy giving some measure of protection to creditors. It is entirely rational and consistent for the act to make a pecuniary limitation as to the creditors, and *no limitation as to heirs or devisees*. Because the pecuniary limitation is applied in one case is no reason whatever that it should be in the other case. The legislative policy embodied in section 4 applies with equal force seemingly to section 17. It required section 17 to completely forbid the domination of the homestead estate by the holder of the legal title. The shelter of the family becoming destroyed upon the death of the husband or wife holding the legal title, the survivor and the minor children would be subject to be dispossessed of their home, *although no rights of creditors should be involved*. There is no pecuniary limitation attaching to the provision forbidding the homestead to be conveyed or encumbered except by deed executed and acknowledged by both husband and wife, or to the provision for survivorship on the death of the person from whose property it was selected. It is not a certain amount of money which the surviving spouse gets the use of.

The former acts were repealed, and, when the legislature of 1879 drew up a permanent form of the homestead law, it used the word "homestead" in creating an absolute disqualification of the husband or wife from whose property it was selected to encumber or alienate the home-

stead by a voluntary deed or devise, and preserved in favor of *creditors* only the limitation as to value. In the mind of the legislator there is the protection of the "homestead exemption" and the homestead itself, and sections 4 and 17 of the act offer protection against the domination of the person from whose property the homestead is selected, and *without any reference whatever to its pecuniary value*, and that means the protection of the homestead itself. There are two ideas here: (1) A place for the homestead claimant where he and his family are safe as to *everybody* if the place is not worth more than \$2,000; and (2), if it does exceed \$2,000 in value, then safe as to everybody except the creditor. Now, in this particular case there is no creditor, and therefore the homestead is a homestead as against *everybody*. Did the legislature intend, then, to turn the widow out because the husband is dead and the children have gone? What legislature would say, "We will make a law to apply to our widows when we die, and to our sisters when they have become widows and to our mothers when our fathers are dead and buried and the mothers are left alone in the old house, and we will say that these wives as they become widows are to be turned out of the homes they have occupied and in which the children have been raised, and they must find new and strange homes in which to finish their lives, so that the other heirs may each receive a few dollars more from the immediate distribution of the estate?" If no future legislature in Nebraska would do such a thing as that, then it would seem that no Nebraska legislature has done it. The right to dispossess the widow of the homestead selected from the property of her deceased husband is not written in the statutes.

It is contended that because this court in the case of *Tyson v. Tyson*, 71 Neb. 438, rendered a decision in conflict with the doctrine announced, therefore the will of the legislature should be ignored, and that an inadvertent mistake should bind the court in the future to a doctrine by which the surviving wife or husband is to be put

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out of the old homestead. In *Tyson v. Tyson, supra*, Peter Tyson died intestate in Washington county, and the plaintiff in error was the widow, and the defendant in error was the only child. The intestate died seized of a farm containing 156 $\frac{3}{4}$ acres. The petition which was filed in the county court alleged that Mary Ella Tyson claimed a homestead interest in said premises, and occupied the dwelling-house and buildings under her claim that the same was the homestead of the decedent and herself during the lifetime of said decedent and at the time of his death. The petition was filed by the son, who alleged that the homestead consisting of the dwelling-house and outhouses and the said land exceeded \$2,000 in value, and that Mary Ella Tyson was only entitled to use and occupy said dwelling-house and outhouses with so much land upon which the same was situated as, taken together with said buildings, shall equal in value the sum of \$2,000, and no more. It is also alleged that, in addition to said homestead, the said Mary Ella Tyson was entitled to dower interest in said land to the extent of one-third thereof; that, under the claim of homestead and dower, she wrongfully excluded the petitioner from said premises, and claimed the whole of said real estate as homestead and dower; that she refused to account for the rent of that portion not included in the homestead interest to which she was entitled; that said real estate was of the value of \$11,750, and exceeded the homestead in value by \$9,750. It was also alleged that Mary Ella Tyson claimed the right to receive from said estate the sum of \$35 a month as support, and that she was drawing the same. There was a prayer for the appointment of three persons to set off the homestead and dower of the plaintiff by metes and bounds, the former not to exceed \$2,000 in value. The answer of Mary Ella Tyson admitted receiving \$35 a month for her support, and claimed the exclusive right to use the land; alleged said land was the homestead of Peter Tyson and Mary Ella Tyson at the time of the death of said Peter Tyson, and that said home-

stead at the death of said Peter Tyson vested in his surviving wife, and that the son, Amasa F. Tyson, had no interest in the land during the lifetime of said Mary Ella Tyson. The answer also alleged that the county court had no right or power to adjudicate the title to said land. Upon the hearing, the county court found that Mary Ella Tyson had a homestead in the premises, or in so much thereof as should not exceed in value \$2,000, and was entitled to dower therein, and appointed three persons to assign her dower and homestead by metes and bounds. From the decree rendered by the county court, Mary Ella Tyson prosecuted error to the district court, where the decree of the county court was affirmed, and the case was then brought to this court by petition in error.

It will be noticed that there is a difference between this case and the *Tyson* case. (1) In the *Tyson* case there was, in addition to the consideration of any homestead claim, the claim that "the said Mary Ella Tyson is entitled to *dower* interest, in said land to the extent of one-third thereof, and is entitled to have the same set aside." This was alleged in the petition as above quoted. It was also stated in the opinion that "the prayer is for the appointment of three persons to set off the homestead and dower of the plaintiff by metes and bounds." (2) In the instant case there is no claim of dower. The fact that *dower* and *homestead* and the support of \$35 a month were all claimed out of this estate of 156 acres no doubt tended to confuse the issues, and perhaps to cloud the minds of all connected with the case. In the *Tyson* case, it was said in the body of the opinion: "This court held, as we have seen, that, in order to oust the jurisdiction of the county court, the right of the applicant must be disputed by presenting an *issue of fact* which, if established by proof, would defeat her claim, and such issue must be one which the county court by its organization is unable to try." It would seem to be absurd that, if the *law* ousts the jurisdiction of the county court, there should be any contention that it presented a *different* question

from an issue of fact ousting such jurisdiction. If the jurisdiction is ousted, that is enough.

The learned commissioner who writes the opinion follows up his first mistake with a second one. He proceeds to discuss the section relating to the exemption of \$2,000 from judgment liens, and fails to reason upon the subject. He writes: "But it will not be claimed that, in a case of that kind, the surviving spouse would take a life estate in the excess by virtue of the homestead act. * * * Neither are we able to see that the surviving spouse has any greater rights when the claimant of the excess is an heir of the deceased instead of a creditor." What the learned commissioner says is a mere dictum. Perhaps the idea of the commissioner who wrote the opinion is derived from the fact that he may have supposed the contention made was not supported by the pleadings. One of the contentions was that a widow not owning a residence suitable to her condition in life might remain in the dwelling-house of her husband so long as she remained a widow without being chargeable with rent. He held this was not supported by the pleadings.

We are now met with a statement that, because of this opinion, this court shall continue to stand where all are agreed that it is wrong to stand. It is urged as a reason why the mistake made in *Tyson v. Tyson* should stand is that it has been the accepted idea of the bar and the judges for a number of years that the \$2,000 exemption applied as well to the survivorship as to the creditor. It is said that it will make a change in the rule of property rights, and that there will be sufferers in consequence of it. The answer to that is that the woman who lives to be an old woman and loses her husband seldom marries again. The same is true of the man who lives to be an old man. It is the exception when he marries again. There is no reason that the heirs are likely to be crowded out, because at the death of the survivor the heirs go into full possession of the property. The survivor rarely has many years to live. We are all inclined to overestimate the

length of time we have to live. The pictures are hanging on the wall of most of those who have preceded us. They are gone and maintain the discussion no longer. In a few years more we shall all be gone, and there will be other occupants of our places. Perhaps no one may say with absolute certainty the number of years that the average survivor is likely to live, perhaps five, perhaps ten, not more than that. At the end of that time the heirs will come into the exclusive possession of that which he has inherited from the deceased wife or husband who has gone before the survivor. The thing contemplated as dangerous to the property rights is not dangerous at all, because it takes nothing permanently, and only maintains a meritorious use. In the interest of humanity this court should at once correct the mistake in *Tyson v. Tyson*, and declare the will of the legislature as it has been expressed. The right of homestead may survive in favor of the husband on the death of the wife, even though no children of the marriage are living (*Burns v. Keas*, 21 Ia. 257; *Ellis v. Davis*, 90 Ky. 183, 14 S. W. 74; *Roberts v. Greer*, 22 Nev. 318, 58 Am. St. Rep. 755), or though the children have removed from the homestead upon which he still resides (*Gray v. Patterson*, 65 Ark. 373, 46 S. W. 730), or though the children have attained their majority (*In re Feas' Estate*, 30 Wash. 51, 70 Pac. 270), or though he is not a housekeeper with a family.

The present value of Mrs. Meisner's homestead interest is found to be \$1,464. She does not get this sum, because it is only the use of a \$2,000 interest in the homestead that she gets, and, when she dies, the heirs of the deceased hold the property free and divested of any claim she may have once had. The interest on the present value, therefore, is all she may safely count on. Six per cent. on \$1,464, the present value, would give her \$87.84 per annum. The smallness of the matter is quite apparent from a consideration of the insignificance of this sum. From this it would seem that early in the history of the people of our state they passed a law which guaranteed to the

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"family," so long as it was needed for that purpose, a homestead which shielded the young and the strong and the old and the feeble alike, and all in the interest of the home. Sections 17 and 4 of the act of 1879 contain a recognition of the principle that underlies all the legislation of the state upon the subject. It is the protection of the home, when once it is established, as long as it may be needed for any surviving husband or wife. The family is a unit of the state. The home protects it. As long as the family exists, the home should exist. This court has already said that the head of the family should be protected in the home, although the children have already grown to maturity and have left it. *Galligher v. Smiley*, 28 Neb. 189.

The judgment of the district court should be reversed.

FAWCETT, J., dissenting.

I am unable to concur in the majority opinion, for the following reasons:

The contest in this case is between plaintiff and the daughters of deceased by a former wife. At the time of his death, Mr. Meisner was the owner of the northwest quarter of section 36, township 10, range 13, in Buffalo county, worth, exclusive of the buildings, \$16,000. He had erected thereon a dwelling-house of the value of \$9,000. For 14 years prior to his death, this dwelling and quarter section of land had been occupied by Mr. Meisner and plaintiff as their home. At the time of his death, he left other lands of the agreed value of \$531,088. By an agreement entered into between plaintiff and the daughters, a division of all of the lands, other than the quarter section referred to, has been agreed upon. It has also been agreed between them that plaintiff shall take the quarter section in controversy at an agreed valuation of \$25,000, and account for the same under the decision to be rendered in this case; that is to say, she is to be given credit for the value of her homestead interest as found by the court, and account for all in excess thereof

up to the \$25,000. The question decided by the district court, and before us for review, is the construction to be placed upon sections 1 and 17 of the act approved February 26, 1879, and in force after September 1 of that year. Laws 1879, p. 57. These two sections are as follows:

"Section 1. A homestead not exceeding in value \$2,000, consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or, instead thereof at the option of the claimant, a quantity of contiguous land, not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens, and from execution or forced sale, except as in this chapter provided."

"Section 17. If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter."

Succinctly stated, the question is: Does the \$2,000 limitation, expressed in section 1, apply to exemptions against creditors alone, or does it also apply to the right of succession under the provisions of section 17? It is argued with great force by counsel for plaintiff that the language used in the different sections of the act indicate that the legislature had in mind what might be termed two homesteads—one, the actual homestead, and the other, the homestead which could be held as against creditors—and that the \$2,000 limitation applies only to the latter.

The title to the act reads as follows: "An act to provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment, levy, or sale, upon execution or other process." It will be seen that the title recites that the act is "to provide for the selection and disposition of homesteads, and to exempt *the same*," not "the same to the extent of \$2,000," but "*the same*"—that is to say, *the homestead*—from judgment liens, etc., indicating, I think, that the intention was to exempt the entire homestead, the selection of which the act following was to provide for, from judgment liens, etc. Section 1 of the act reads: "A homestead not exceeding in value \$2,000, consisting of the dwelling-house in which the claimant resides," etc. If we read this clause of section 1 with the same punctuation appearing in the title, which would place a comma after the word "homestead," the clause would then read, "A homestead, not exceeding in value \$2,000, consisting of the dwelling-house," etc. That punctuation, or reading it in that manner, would seem to indicate that the \$2,000 relates to the entire homestead, and not to a subsequently to be determined portion thereof. That this is the construction which has been placed upon this act for over 30 years cannot be questioned. Estates have been divided and lands partitioned, all over the state, under that construction.

In *Meek v. Lange*, 65 Neb. 783, suit was brought to recover damages for the breach of an executory contract, made by the husband without the assent of his wife, for the sale of the homestead. In the syllabus it is held that an executory contract for the sale of the family homestead, to which the wife is not a party, is invalid, and its non-performance does not furnish a basis for recovery of damages for the loss of the bargain. On page 788, speaking through Mr. Commissioner HASTINGS, it is said: "Doubtless, in case of bad faith, or where the action of defendant has caused special damages, a right of action would arise for such injury. But it would seem entirely inconsistent

to allow a recovery of damages for the loss of a bargain which plaintiff made in full view of evident facts with one whom those facts rendered incompetent to sell the property. As above stated, only damages for loss of the bargain were allowed in this judgment. The judgment, therefore, cannot stand. Possibly the plaintiff is entitled to nominal damages for the absolute refusal to convey any of the premises, as they were found to be worth more than \$4,000. The homestead right evidently does not protect defendant as to more than \$2,000 worth." It will be observed that that was not a case involving the question of exemptions against creditors, but that it involved the whole right of homestead, which right the court there said did not protect defendant as to more than \$2,000.

Upon the third hearing of *Teske v. Dittberner*, 70 Neb. 544, the last two paragraphs of the syllabus read:

"(10) A parol agreement made by the husband with a third party to devise property embraced within a homestead, like an agreement to convey the reversionary estate, is in conflict with the provisions of the homestead act and is not specifically enforceable, even though substantial performance of the contract by the promisee may have taken place.

"(11) When such an agreement includes other land than that included within the homestead, the contract may be specifically enforced except as it affects the homestead property."

In the opinion, on page 550, it is said: "In speaking of the homestead, we wish to be understood as having reference to that part of the real estate in controversy which consists of the dwelling-house, in which the promisor, Frederick Teske, and his family, at the time, resided, and its appurtenances and the land on which the same are situated, not exceeding 160 acres in area, nor \$2,000 in value." Here again this court, in a case where the question of the rights of creditors was not involved, limited the homestead to the dwelling-house and its appurtenances, and the land on which the same are situated, not exceeding 160 acres in area, "nor \$2,000 in value."

In *Tyson v. Tyson*, 71 Neb. 438, the third paragraph of the syllabus reads: "In a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead not exceeding 160 acres in area and \$2,000 in value." In the opinion, on page 443, it is said: "Another contention of the plaintiff is that she is entitled to hold and occupy the entire tract of land as a homestead, regardless of its value, and this contention is supported by a more plausible argument than we should have thought possible in view of the plain provisions of the homestead act. A homestead within the meaning of that act, chapter 36, Compiled Statutes (Annotated Statutes 6200), is defined and limited by the first section thereof, which is as follows: (Section 1 of the act set out.) The first limitation imposed is that the homestead shall not exceed \$2,000 in value; the next, that it shall not exceed 160 acres of land not in any incorporated city or village, or, in lieu thereof, not exceeding two lots within such city or village. The head of a family might actually occupy more than 160 acres of land, not in an incorporated city or village, or more than two lots in such city or village, as a family homestead. But it will not be claimed that, in a case of that kind, the surviving spouse would take a life estate in the excess by virtue of the homestead act. The limitation as to value is as certainly and positively fixed by statute as the limitation as to quantity. Neither are we able to see that the surviving spouse has any greater rights when the claimant of the excess is an heir of the deceased instead of a creditor. The homestead, which vests in such survivor for life, is the identical homestead in quantity and value defined in section 1 of the act. The statute recognizes none other." It will be seen that the question under consideration in the case at bar was squarely before the court, and was considered and squarely decided in that case.

In *Wardell v. Wardell*, 71 Neb. 774, the third paragraph of the syllabus reads: "A homestead exemption is by the law of this state limited to the value of \$2,000, and

if, upon the death of a husband, the dwelling and the tract of land adjacent thereto, selected from his estate and occupied by himself and family as a homestead, exceed that value and are so situated that the dwelling together with the grounds upon which it stands, and not exceeding that value, cannot be set apart from the residue of the tract, no legal estate in the land, or in any part of it, passes to the widow and heirs under the homestead act, but in lieu thereof an equitable interest to the value of \$2,000 in the entire tract does pass to them thereunder." In that case the land consisted of 120 acres, including the family dwelling-house, the whole being of the value of about \$14,000. Upon the trial it was found that the value of the dwelling-house alone was \$3,000, and of the buildings appurtenant to it, \$3,500, and of the equitable title to the land, \$7,200, and that the premises were not susceptible of division or partition, so as to permit the dwelling-house and the ground upon which it was erected, of a value not exceeding \$2,000, to be set apart as a homestead. The district court thereupon decreed a sale of the entire tract and the investment of \$2,000 of the proceeds thereof at interest during the life of the widow, she to receive the interest and income thereof until her death, the principal to then descend to the heirs at law of the decedent. The widow prosecuted error to this court. Her contention was that the provisions of the statute for appraisal and setting apart of the homestead during the lifetime of the person from whose estate it was selected, or the sale of it, in instances in which it is not susceptible of division, and the setting apart of \$2,000 of the proceeds of the sale, are not applicable after his death, and that, hence, the statutory restriction as to the value of the exempt property ceases with that event, "and that therefrom the entire premises occupied as a homestead, to the whole extent of the territorial limits prescribed by statute, acquire the character of exemption regardless of values." In the opinion, on page 777, it is said: "We think this reasoning is at fault in overlooking the fact that that

which constitutes the homestead, and that alone, therefore, which passes to the surviving spouse, in cases of this kind, is not necessarily any defined tract of land, but only so much of a definable tract, if any, as, including the dwelling house and appurtenances, shall not exceed \$2,000 in value." The judgment of the district court was affirmed. It is said that the language quoted from the last above case is *obiter dicta*, as applied to this case, for the reason that there the right of creditors was involved. The record in that case, however, shows that the creditors were general creditors of the decedent who had not obtained any lien upon the land prior to his death, and I am inclined to think that, if the right of succession is as contended for by the plaintiff here, it would have been good in *Wardell v. Wardell*, for the reason that, as insisted in that case, the right of succession attached prior to even the assertion of any debts against the decedent. But whether it be *dicta* or not, it shows the view of the learned commissioner who wrote that opinion, concurred in by his two able associates, and approved, without dissent, by the court.

In *Jerdee v. Furbush*, 115 Wis. 277, 279, 281, the court had before it the question of the rights of a grantee of a homestead under a conveyance made without the wife's signature. In the opinion the court say: "We cannot at this late day decide that as a new question. If it were otherwise, a different result of this appeal might occur than the one we have decided upon." The opinion then cites and comments upon two prior decisions of the court, and adds: "The law has thus stood for nearly a quarter of a century, and whether the court's construction of the statute was right or wrong it must now be considered the law the same as if the idea involved were literally expressed in the statute. It relates to property. It has become, by the lapse of time, a rule of property, which, by well-settled principles, can only be rightly changed by legislative enactment." In conclusion the court say: "It follows from what has been said that (naming the two

cases referred to) rule this case. To try to distinguish one case from another upon the facts, where the ruling principles in one are plainly identical with those in the other, creates uncertainty and confusion in the law. That should be avoided as to any subject, but particularly in respect to titles to real property." The reasons there given for following the former decisions appeal to me as eminently sound. The ruling principles in the four former opinions of this court are plainly identical with the present case, and to attempt now to distinguish one from another upon the facts would, as stated by the Wisconsin court, "create uncertainty and confusion in the law."

Our former holdings, together with a similar and state-wide construction of the act by the district courts for more than 30 years, should set the matter at rest. I am unwilling at this late day to disturb that which for so many years has been considered settled. I therefore conclude that the limitation of \$2,000, expressed in section 1, is not restricted to exemptions against creditors, but also applies to the right of succession under the provisions of section 17, and insist that a construction of a statute, established by a line of former decisions of this court, uniformly followed by the district courts, and long acquiesced in by the bar, should not, ordinarily, be disturbed, even though the court, as subsequently constituted, might have placed a different construction upon such statute, if before it for the first time.

BARNES and LETTON, JJ., concur in above dissent.

ADOLPH LAZURE, APPELLANT, v. MAVERICK LOAN & TRUST
COMPANY, APPELLEE.

FILED NOVEMBER 13, 1912. No. 16,794.

Taxation: REDEMPTION FROM SALE. Before bringing an action to redeem from tax sale and treasurer's deed, all taxes subsequent to the sale, due and payable, must be paid. If subsequent taxes

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have been paid by the purchaser at tax sale, the amount so paid, with interest, should be included in the decree allowing the redemption. The landowner is not required to reimburse the purchaser at tax sale before bringing his action to redeem.

APPEAL from the district court for Box Butte county:
WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

John Lothrop and B. F. Gilman, for appellant.

C. Patterson, contra.

SEDGWICK, J.

The defendant claims an interest in the land in question by virtue of an administrative sale for the taxes assessed thereon in the year 1904 and a treasurer's deed pursuant thereto. The plaintiff brought this action to redeem the land from the taxes, claiming that the treasurer's deed was void. The trial court found for the defendant, and the plaintiff has appealed.

It is conceded that the tax deed was void for several reasons, and it is contended by the defendant that he has paid all the subsequent taxes upon the land, and that the plaintiff cannot maintain this action to redeem without first reimbursing him for the taxes so paid. This does not constitute a defense to the action. Section 11111, Ann. St. 1911, provides that the owner of land sold for taxes may redeem by paying the amount of taxes for which the land was sold, with interest, "together with all other taxes subsequently paid." The taxes, according to the admissions of the parties upon the record, have all been paid, and to require the plaintiff to reimburse the defendant for subsequent taxes paid would, in the language of the supreme court of Iowa, "not be a payment of the taxes. It would be a reimbursement for taxes previously paid." *Taylor v. Ormsby Bros.*, 66 Ia. 109. Our statute requiring the payment of taxes before bringing an action to redeem was borrowed from Iowa. The construction that court put upon it is a reasonable one, and we are content to follow it.

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The judgment of the district court is reversed and the cause remanded, with directions to allow the plaintiff to redeem as herein indicated.

REVERSED.

NETTIE MAJORS, APPELLANT, v. THOMAS J. MAJORS,
APPELLEE.

FILED NOVEMBER 13, 1912. No. 16,806.

1. Statute of Frauds: PARTNERSHIP: ACCOUNTING. An agreement of settlement between partners, or between one partner and the representatives of a deceased partner, by which a division is made of all or a part of the partnership property, some of which is real estate, is not within the statute providing that no estate or interest in land shall be created, granted, assigned, surrendered, or declared, unless by operation of law, "or by a deed or conveyance in writing." Comp. St. 1911, ch. 32, sec. 3. Such agreement between partners may be oral, if upon sufficient consideration.
2. Brokers: SALE OF LAND: AGREEMENT BETWEEN PARTNERS. Such agreement between partners providing that one of the partners may find a purchaser for the land and have the proceeds above a certain amount is not within section 74, ch. 73, Comp. St. 1911, relating to contracts with agents or brokers to sell lands.
3. Compromise: CONSIDERATION. In an action upon an alleged settlement or compromise, the plaintiff must allege that there was some reasonable foundation for his claim, and that it was made in good faith; otherwise there is no consideration for the alleged agreement upon compromise.
4. —: ACTION: PLEADING. A petition in an action to recover upon an alleged contract of settlement or compromise must show some consideration for the contract, or it will be subject to a general demurrer.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

George A. Adams, for appellant.

T. F. Hamer and F. M. Tyrrell, contra.

SEDGWICK, J.

This case was decided in the district court for Lancaster county upon a general demurrer to the plaintiff's petition, and the plaintiff has appealed.

The petition alleged that the defendant and the plaintiff's husband were formerly in partnership in the mercantile business, and that they sold and disposed of the business, and took as part consideration therefor a tract of land located in Box Butte county, the title being taken in the name of the defendant, and that soon after that the plaintiff's husband died, and that the defendant took possession of the land "to wind up said business of said partnership, pay the obligations, if there were any then unpaid, reduce the assets, including the above described real estate, to money, and adjust and settle up said partnership. That the matter ran along from that time until about the months of February or March, 1907 (about 11 years), the said defendant being in possession of said real estate all the time and receiving the rents, profits and proceeds thereof, and all the time claiming he was adjusting said partnership matters;" that the plaintiff then demanded a settlement of the partnership affairs, and that the defendant account to her, for herself and her children, "for the interest of her said deceased husband in and to said partnership property;" that a controversy existed and had existed for some time as to the interest of the plaintiff and her children in the real estate, the plaintiff insisting for herself and children that they had an interest in the real estate, and the defendant insisting that they had no interest therein, and that it was agreed between the parties, the plaintiff and the defendant, "that this plaintiff should proceed to sell said real estate, and out of the sale of the same the said defendant was to have \$8,000, and all over and above said sum of \$8,000 was to be received by this plaintiff for the benefit of herself and the said children;" that the plaintiff found a purchaser who was ready and able and willing and offered to give \$12,000 for the real estate, which the plaintiff agreed to

take, and notified the defendant, but he "refused to comply with the terms of said contract, but, on the contrary, utterly failed and completely repudiated the same and declined to execute a deed to said real estate;" that there were seven children of the plaintiff and her husband, who were minors at the time of her husband's death. The allegation that the children were minors at the time of the husband's death was not, of course, an allegation that they were minors at the time of making the alleged contract, which was 11 years later, but this perhaps is not a material consideration.

The defendant urges that an oral contract of this kind would not be valid because of the statute of frauds. There does not seem to be any merit in this objection because no estate or interest in the land was created or attempted to be created, granted, assigned, or surrendered or declared by the alleged contract.

The alleged contract would not be within the statute providing that contracts of agency for the sale of real estate must be in writing and signed by the parties, since this was not a contract of agency, but was rather an attempt to adjust matters arising out of the relation of partnership.

We think, however, the petition entirely fails to state a cause of action for other reasons. It was, of course, the duty of the surviving partner to take possession of the land, to wind up the business of the partnership, pay its obligations, to reduce the assets, including the land, into money, and adjust and settle up the partnership business, as it is alleged in the petition he was at all times attempting to do. The plaintiff's husband, if living, would have no legal claim to the proceeds of the land until all this had been done. If her husband was living, he would have had such an interest in the business as would without doubt afford a basis for a contract of settlement between himself and the defendant, adjusting their mutual rights of the assets of the partnership, and it may be that this interest would be sufficient to afford a basis for a contract

of the nature of the one alleged. The plaintiff, however, did not succeed directly to the rights of her husband in the assets of the partnership, since for the purpose of settlement between the parties such assets are regarded as personal property. She would have an interest in the proceeds of the land, provided that, after closing the partnership business, the assets of the partnership were more than sufficient to adjust the claims against the partnership, and provided, further, that the share of the estate of the deceased partner therein was, together with the other property of the estate, more than sufficient to adjust the liabilities of the estate and pay the costs of administration. She had no legal title or claim to the assets of her husband's estate, as they belonged to the administrator. She did not have any right of action against the defendant to settle or compromise. The defendant was still attempting to adjust the partnership business, and an action for an accounting and adjusting of the partner's interest could only be maintained by the administrator of the estate of the deceased partner. If she had any interest whatever in this land, it was contingent, first, upon the value of the assets of the partnership; and, second, upon the solvency of her husband's estate. She does not allege the facts in regard to either, from which it might be found that she had any probable interest. It is not necessary to determine in this case whether the plaintiff could have alleged a cause of action of the nature here attempted. It is sufficient for the determination of this case that she has not alleged any value of the assets of the partnership, nor the liabilities thereof, nor has she alleged any settlement of the estate of her deceased husband, nor the amount of the assets or liabilities of that estate. She has not alleged in general terms that she had any title or interest, legal, equitable or contingent, in this land. There was therefore no substantial interest or claim to compromise or settle, and consequently no consideration for the alleged agreement. In the absence of all these allegations, she has failed to allege that she had any

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legal interest in this land to form any basis of settlement, and the demurrer to the petition was rightly sustained.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

FRANK CHALUPA ET AL., APPELLEES, V. TRI-STATE LAND COMPANY, APPELLANT.

FILED NOVEMBER 13, 1912. No. 16,809.

1. **Waters: IRRIGATION: REFUSAL TO FURNISH WATER: ACTION FOR DAMAGES: PARTIES.** Two of the plaintiffs, being owners and holders of a water right upon which they were entitled to water from defendant's canal for irrigation, leased land to the other plaintiff and agreed to furnish him water for irrigation thereon. The tenant duly demanded that defendant furnish the water under the water right, and defendant refused, apparently contending that the water right was for some reason invalid, but made no objection that the holders of the water right had not assigned the same to their tenant or authorized him to demand and use the water thereunder. *Held*, That, after action was brought for damages caused by refusal to furnish any water under the water right, the defendant could not defend against the claim of the tenant on the ground that his landlords had not authorized him to use the water right, and, the rent being payable in kind, the landlords and tenant were owners in common of the crops and could maintain a joint action for damages thereto.
2. ———: ———: ———: ———: **DEFENSES.** In such case, if the landlords and tenant have recognized the lease and the tenant has farmed the land under it, it is not a valid defense for the water company that the lease was voidable as between the parties thereto because of informalities in its execution.
3. **Damages: INJURY TO CROPS: QUESTION FOR JURY.** In an action for damages to growing crops, the amount of damage is peculiarly a question for the jury. The difficulty of determining the value of the crops and the exact amount of damage thereto is not a sufficient reason for denying a recovery for a wilful injury to the crops.
4. **Appeal: INSTRUCTIONS: FAILURE TO REQUEST.** The trial court should instruct the jury as to the burden of proof, but a failure to do so

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will not require a reversal of the judgment, when no such instruction was requested by the complaining party, and no prejudice appears.

5. ———: ASSIGNMENTS OF ERROR: REVIEW. It is unnecessary in this case to decide whether a general demurrer to a petition, "so far as it attempted to state a cause of action in favor of one" of several joint plaintiffs, can be considered, since the question of law which defendant desires to raise by this demurrer is presented and determined under other assignments.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Wright & Duffie, for appellant.

Morrow & Morrow, contra.

SEDGWICK, J.

In 1907 Ernest M. Valentine and William C. Phillips were the owners of a school-land lease of a tract of land in Scott's Bluff county and were in possession of the land under the lease, and in March of that year they leased the land in question to the plaintiff Frank Chalupa for one year from March 1. The contract was that the rent should be paid in kind, and the lessors agreed, among other things, "that the first party shall furnish water for said premises as follows: Water for alfalfa and farm land if it can be secured, but the party of the first part shall not be held responsible for any damages accruing to the party of the second part by reason of shortage of water, or by reason of an overflowage thereof." Valentine and Phillips were the owners of a water-right contract by which the grantor of the defendant agreed to furnish 80 inches of water for irrigation purposes. The defendant succeeded to the liability to furnish this water under the contract, and no question is made upon this point. The land in question was within the territory upon which the owners of the water contract might demand the use of the water. The plaintiff Chalupa, in the summer of 1907,

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had growing on the land in question crops consisting of oats, spelts, wheat and alfalfa. The defendant refused to furnish water for these crops when demanded by Chalupa, and the crops were damaged for want of water. This action was brought by said Valentine, Phillips and Chalupa to recover such damages. Afterwards, upon the death of Phillips, the action was revived in the name of Helen Phillips, administratrix of his estate. The judgment was in favor of the plaintiffs, and the defendant has appealed.

1. The defendant demurred to the petition "so far as it attempted to state a cause of action * * * in favor of the plaintiff Frank Chalupa." The demurrer was overruled, and the defendant alleges that this was erroneous. The question whether a demurrer will lie to the cause of action of one of several joint plaintiffs is discussed in the briefs, but it is not necessary to a determination of this case. If Frank Chalupa had no cause of action against the defendant under the allegation of the petition, then he had no cause of action under the evidence, as the evidence follows the petition in that regard, and the questions discussed upon the sufficiency of the petition are also discussed and necessarily raised upon the sufficiency of the evidence. These questions, then, will be considered under that assignment.

2. It is contended that there was no privity of contract between the defendant and the plaintiff Chalupa, there being no evidence that the other two plaintiffs ever assigned to Chalupa any interest in the water-right contract; that Chalupa's claim for damages, if he had any, was against his coplaintiffs, and that he could not recover directly from the defendant.

"Where land is leased and rent reserved in kind or share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops on such land during the life of the lease." *Sims v. Jones*, 54 Neb. 769. "Tenants in common may join in an action for the possession of real estate held by one without title."

Mattis v. Boggs, 19 Neb. 698. "Where land is let upon shares, the owners of crops may maintain an action against third persons for unlawful trespass upon or injury to such crops. However, one joint owner cannot alone maintain such action without joining therein the other joint owners of such property, and those refusing to join in the action as plaintiffs should be made parties defendant." 24 Cyc. 1468.

Valentine and Phillips had a valid water right which they were entitled to use upon this land. They leased the land to Chalupa and agreed with him to furnish water for the land. Chalupa demanded the water from the defendant under the contract which his landlords held. There is no evidence that his landlords used the water on any other land, or demanded that water be furnished for use upon any other land. The landlords have ratified the demand of Chalupa that the water be furnished upon this land when Chalupa demanded the water. The defendant did not object that he was not entitled to use the water right, but refused to furnish water to any one under it. They cannot now change the ground of their refusal, and it does not rest with the defendant to deny that Chalupa was authorized to demand and receive the water under the contract by his lessors.

3. The lease from Valentine and Phillips to Chalupa contained the provision "that said party of the second part shall not be entitled to the possession of said premises, nor have any interest whatever therein, until this lease is signed by him and by the president or secretary of the Lincoln Land Company and delivered to said second party." The defendant now objects that the lease was invalid, because it does not appear that it was ever signed by the president of the Lincoln Land Company. There is no merit in this objection. The evidence shows that the parties under the lease regarded it as valid; that Chalupa took possession of the land under it and farmed it in accordance with the terms of the lease; and it is immaterial to the defendant whether one of the parties

to the lease might have avoided it or not, since there was no attempt to do so.

4. It is contended that the damages allowed are excessive; that the evidence will therefore not support the verdict and judgment. Several witnesses in behalf of the plaintiff, farmers and others with experience in crops and crop values, testified to the value of the growing crops before they were injured for want of water, and to the value after the injury. Upon cross-examination by the defendant these witnesses were cross-interrogated as to their means of knowledge and as to their method of computing the values. In some cases it appears that their method of computing values was fanciful and unsubstantial. This fact goes to the importance and weight of the testimony. It is not sufficient ground for disregarding their testimony entirely by the court as a matter of law. It is difficult to estimate accurately the damages as expressed in dollars and cents to a growing crop because of lack of moisture. There are other uncertainties in regard to the result of farming and crop raising than those depending upon moisture, and it is impossible to say with certainty what would be the result if sufficient water had been furnished. The difficulty in estimating the damages, however, in such cases has never been considered sufficient ground to refuse to allow compensation for damages wilfully inflicted. It presents a question peculiarly for the jury, and where the evidence is substantially conflicting as in this case, and the law is complied with in submitting the matter to the jury, their verdict must control. The judgment in this case seems to us to be quite as much as the evidence would warrant, but it is not excessive, so that we can say as a matter of law that the verdict is clearly wrong.

5. It is complained that none of the instructions of the court in direct terms told the jury "that the plaintiff, in order to establish a case, must do so by a preponderance of the evidence." The court should have so instructed the jury, and no doubt would have given such an instruction

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if it had been presented and requested. The duties of a trial court in jury trial are quite exacting, and, if the defendant discovers such an omission as this, fair dealing requires him to call the attention of the trial court to the matter. Not having done so, he ought not afterwards to be allowed to subject the parties to costs and vexation of another trial.

No substantial error appearing in the record, the judgment of the district court is

AFFIRMED.

LEVI L. CORYELL V. STATE OF NEBRASKA.

FILED NOVEMBER 13, 1912. No. 17,641.

Information: SUFFICIENCY: OPERATION OF AUTOMOBILE. An information which under three counts in reference to a single transaction charges in the first count that the defendant permitted his infant son, under 16 years of age, to operate defendant's automobile on the highway, and in the second count charges that defendant permitted said infant son to drive said automobile past a vehicle drawn by a team of horses, without reasonable caution, and without calling to or giving any sound to indicate to the driver of said horses a desire to pass the same, and in the third count charges that the defendant permitted said son to drive said automobile past said team of horses at a swift rate of speed, and return to the center of the road within less than 30 feet from said team of horses and said spring wagon, will not sustain a conviction upon either count, where the evidence clearly establishes the fact that at the time charged the defendant himself had actual control of and was operating said automobile.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

M. S. McIninch and Ernest F. Armstrong, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

HAMER, J.

The plaintiff in error, Levi L. Coryell, hereinafter

called the defendant, was informed against in the district court for Nemaha county and charged with: (1) Permitting his infant son to operate his, defendant's, automobile on the public highway. (2) Permitting his said son to drive past a team without using reasonable care. (3) Permitting his said son to drive past a team without using reasonable care, and to return to the road less than 30 feet in advance of said team. The particular acts charged against the defendant are all shown to have occurred at the same time, and therefore constitute one transaction. There was a trial to a jury, and the defendant was found guilty on each count, and was on each count sentenced to pay a fine of \$5. The defendant asks a reversal of the judgment upon five distinct grounds, only one of which we deem it necessary to consider, and that is that "the verdict is contrary to the evidence."

The facts as they appear are sworn to by the defendant and his little son, Leland, and their testimony is not controverted in any material matter, so far as it relates to the operation of the automobile by the defendant himself. The little son is shown by the evidence to have been only 11 years old, and there is testimony that he had his hands on the "steering wheel"; but he testified, and no one disputes him, that "I was sitting there and I had my hands here; I was sitting here, and papa had his hand right in under my hand, he had it between these two fingers; he had the throttle, he could operate the throttle, he had it right between his fingers there." He also testifies that his father was guiding the car, and that it was not possible for him (the little boy) sitting in the automobile seat to reach the pedals. No one says it was.

The defendant testified that when he saw the team, after turning the corner, he blew the whistle several times, but "I presumed that they would (hear the whistle), and I took the right side, which placed me on the right between Whitmore's team and the fence. I proceeded along that line, thinking they would give me their right of the road, and as we proceeded, it put me in this 'V'

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shape. The gutter I seen was deep. The dirt was washed in from the culvert below, and I thought I could get in the gutter; but, when I got to this gate, the ditch became immediately abrupt, I having pulled to the right, and about that time I was about even with the team, my machine was about even with the team, I either had to pull in to that gate or that ditch, or put the team over on the other side of the road. It was the only thing I could do in the emergency, and I did it. Q. State whether or not you were driving the car or Leland driving the car. A. I had my hand on the lever and a hand on the throttle, my left foot was on the pedal, my left hand was reached under the throttle, I have a device which is about the size of that pencil, beneath the wheel, I had the mechanics pin that right close to the wheel so that I could reach it and govern the throttle. My throttle is pinned so I can drive it when Leland is at the wheel. He had both hands on the wheel at the time." He then testified that his hand was under the boy's hand and that he had hold of the throttle. "Q. Tell the jury whether or not, in that condition, you can control that car. A. Yes, sir. Q. Tell the jury whether or not you were controlling that car. A. Yes, sir; I was." He then testified that the ditch became suddenly abrupt, and that he had to make a turn or go into the ditch, and that the ditch was four feet deep.

The evidence clearly seems to show that whatever was done towards the driving and control of the automobile was done by the father, and not by his little son, and therefore that the defendant is not guilty of permitting his son to do the three several acts alleged to be done in the three counts of the information. The evidence is insufficient to sustain the judgment. This court held in *Garfield v. Hodges & Baldwin*, 90 Neb. 122: "A verdict, so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded."

It may be urged that the automobile turned into the

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road after passing the team less than 30 feet in advance of it, and therefore that the defendant is guilty of that offense in any event. It should be remembered, however, that there is no charge that the defendant did it. The charge is that he permitted his infant son to do it, and the evidence does not support that charge. The thing forbidden by the statute (Ann. St. 1911, sec. 6234) is permitting "a person under 16 years of age or an intoxicated person to operate a motor vehicle." The charge in the third count is: "The said Levi L. Coryell, then and there being, did wilfully and unlawfully permit his infant son, Leland Coryell, a boy under 16 years of age, to drive said automobile past the said team of horses and said spring wagon," and "wilfully and unlawfully return to the center of the road within less than 30 feet of said team of horses and said spring wagon." Seemingly the charge alleges a violation of sections 6234, 6236, Ann. St. 1911. The former relates to the permitting of one under 16 to drive, and the latter to the manner of driving. As the driving is alleged to have been done by the little boy, it is fairly to be presumed that the returning to the center of the road was intended to be alleged as done by the little boy, all under the permission of his father. If so, and it appears from the evidence that the little boy only had his hands upon the "steering wheel," and could not reach and did not touch the pedals, and that he had nothing to do with the throttle, but that the father had hold of the "steering wheel," and could and did reach the pedals, and also had his hand upon the throttle, and that he actually controlled the car, and what the little boy did was only a make believe—a sort of play or pretense—something not uncommon in the lives of children who seek to imitate the actions of their parents and others, then there is no evidence to sustain the verdict and judgment, and the same should not be allowed to stand.

The most that any of the witnesses for the state testified to in the case is that they saw Leland's hands on the "steering wheel." They did not all testify to that. No

one of them testified to seeing his feet on the pedals or his fingers on the throttle. It would seem not to be possible to operate such an automobile as this one was without doing these things. In order to operate such a car, it would seem to be necessary to have the feet on the pedals and to have hold of the throttle, and the little boy was too small, as the testimony shows, to reach the pedals with his feet while sitting in the seat. There is no dispute about the fact that the defendant was in the car at the time and sitting with his little son. Some of the witnesses were of the opinion that the defendant did not have his hand on the "steering wheel," while others said that they did not know, but they did not testify to the other necessary things to show that the defendant was not operating the machine. In operating a motor vehicle, it would seem that the person who does so has charge of the vehicle and is directing its course without the interference or control of another person. The defendant did not place his little son in charge of the car and start him out on the road. It is such an act as that that the statute is calculated to prohibit. It could not have been contemplated that a man should be punished who was driving his car, because his little boy placed his hands on the "steering wheel."

The charge in the first count is that the defendant permitted his infant son to operate his automobile on the public highway. The mere operation of the machine is itself the offense. The fact alleged that the defendant permitted his infant son to drive past a team without using reasonable care does not state something that is forbidden by law, except as the defendant is forbidden to permit his infant son to *operate* a motor vehicle. There is no penalty to be inflicted upon the defendant because he permits his infant son to drive past a team without using reasonable care. Driving past a team without using reasonable care might be charged as an offense against the defendant, but the defendant is not forbidden to allow his son to do so, except as he is forbidden to allow his son, if he be less than 16 years old, to operate his automobile. The second

count therefore charges nothing to be tried if the first count is disposed of. The third count attempts to charge, and does charge, that the defendant permitted his son to drive past a team without using reasonable care, and to return to the road less than 30 feet in advance of said team. That act is not forbidden, so far as it might prohibit the father from permitting his son to drive past a team and to return to the road less than 30 feet in advance of the team. It is only forbidden under the general provision that the father cannot permit his son to operate his automobile on the public highway. The things attempted to be charged in the second and third counts are not offenses. The thing that the father is forbidden to do is to permit his infant son to "operate a motor vehicle." Whether the infant son drives straight in the road, whether he drives past a team and whether he returns to the road less than 30 feet in advance of the team are all matters along the same line, and immaterial, except as they show, if proved, that the defendant permitted his son to operate a motor vehicle. If the father permitted his son to do the things attempted to be alleged in the second and third counts, then he is punishable because he permitted the son to *operate the automobile*, and not because of what the son did in going around the team or in returning to the road. It is the *permission* given to the son to *operate the machine* that makes the offense. It is not the *way* that the son operates the machine that makes the offense, but the mere fact that he does operate it.

Instructions 3 and 5 are possibly misleading upon the ground that the charges contained in the second and third counts do not justify them. As no complaint is made of these instructions we will not consider them. The evidence is not sufficient to sustain the verdict. The judgment is

REVERSED.

REESE, C. J., and ROSE, J., dissent upon the ground that the evidence was conflicting and the verdict of the jury should stand.

JOHN TONGUE, APPELLANT, v. R. D. LLOYD ET AL., APPELLEES.

FILED NOVEMBER 27, 1912. No. 16,820.

Justice of the Peace: CONTINUANCE: REVIEW: FINAL ORDER. The continuance of a civil suit by a justice of the peace for more than 90 days from the return day of the summons, without the consent of the parties, is a discontinuance of the action, and therefore a final order, which may be reviewed by proceedings in error in the district court.

APPEAL from the district court for Polk county: BENJAMIN F. GOOD, JUDGE. *Reversed with directions.*

Mills, Mills & Beebe, for appellant.

E. E. Stanton and C. S. Roe, contra.

REESE, C. J.

This action was commenced before a justice of the peace of Polk county. The summons was issued on the 30th day of August, 1909; the 9th day of September being set for the trial. On that day the parties appeared, and, by agreement, the cause was continued to October 9. On October 9 a further continuance was had to November 9, on the motion of plaintiff. On that day the cause was again continued to December 9 by agreement of the parties. December 9, the parties appeared, when, on motion of defendants, and over the objection and exception of plaintiff, a continuance was had for an additional 30 days, to January 8, 1910. The objection to the continuance was based upon the ground that the order extended the continuances for more than 90 days from the return day of the summons. Plaintiff then presented the case to the district court by petition in error, upon the contention that the order worked a discontinuance and dismissal of the case, and was therefore final. This view seems not to have been entertained by the district court, and the petition in error was dismissed at plaintiff's costs. Plaintiff appeals.

Defendants have filed no brief, nor have they appeared

in this court further than to acknowledge service of the notice of appeal, and we are left wholly in the dark as to their theory of the case, or the views of the district court.

Sections 960 and 961 of the code provide that a case may be adjourned for 30 days upon the application of either party, either on the return day or any subsequent day to which the cause may stand adjourned, "but not to exceed 90 days from the time of the return of the summons, upon compliance with the provisions" of the statute. If the adjournment, without plaintiff's consent and over his objection, for more than 90 days worked a dismissal of the case, and the justice thereby lost jurisdiction to proceed further without the consent of the parties, the order was final, and the proceeding in error would lie. We are not aware that this identical question has ever been before us. In *Fischer v. Cooley*, 36 Neb. 626, the final adjournment, beyond the 90 days, was had by the agreement of the parties to the suit, and, for that reason, it was held that jurisdiction was not lost; but we said: "Under said section (961), when a justice of the peace adjourns a suit pending before him, without the consent of parties, for more than 90 days from the return day, it operates as a discontinuance." In Maxwell, Practice in Justices' Courts (5th ed.) 129, it is said: "Without consent of the parties, the court has no authority to adjourn a cause more than 90 days from the return day of the summons. An adjournment exceeding that time, without consent of the parties, operates as a discontinuance of the action"—citing *Dunlap v. Robinson*, 12 Ohio St. 530. While the exact question here presented was not involved in that case, the logic of the opinion sustains the text in Maxwell's Justice Practice. In the body of that opinion it is said: "His (the justice) power of adjudication is derived from the statute, and, if not exercised within the time allowed by law, it is clearly lost; and the cause is no longer pending before him. The legal effect of such a failure in duty is a discontinuance of the action. So, jurisdiction may be lost by an adjourn-

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ment of the suit, without consent of parties, for a longer time than the statute permits. Such unauthorized adjournment, or other neglect of duty by the justice, which prevents a hearing and determination of the suit within the proper time, it has been repeatedly held, works a discontinuance of the action."

The judgment of the district court is reversed and the cause is remanded to that court, with direction to reverse the ruling of the justice of the peace, with costs to plaintiff, and retain the cause for trial, as provided by section 601 of the code.

REVERSED.

ALBERT PRINCE V. STATE OF NEBRASKA.

FILED NOVEMBER 27, 1912. No. 17,716.

Homicide: DEFENSE OF INSANITY: EVIDENCE. Plaintiff in error was convicted of the crime of murder in the first degree and sentenced to death. On error to this court, no question of law as to procedure is presented. The defense was insanity at the time of the killing, and the case is presented upon the sole question of fact as to the accountability of the accused. Upon a review of the evidence, it is *held*, by a majority of the court, that the judgment and sentence should be affirmed.

ERROR to the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

A. E. Howard and *Price & Abbott*, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

REESE, C. J.

On the 17th day of February, 1912, the county attorney of Lancaster county filed in the office of the clerk of the district court for said county an information against Albert Prince, charging him with the crime of murder in the first degree by cutting and stabbing one Edward D. Davis

so that from the effects thereof the said Davis died. The information is in the usual form followed and prescribed in such cases, and, as its sufficiency is not here questioned, it will not be necessary to set it out in detail. The accused was arraigned in open court, and entered the plea of not guilty. A jury trial was had, which resulted in a verdict finding him guilty as charged in the information, and fixing the punishment at death. A motion for a new trial was filed and overruled, when sentence of death was pronounced, and fixing the date of execution on the 30th day of August, 1912. The case is now presented to this court for review by petition in error, and, under the constitutional provision, all further proceedings are thereby stayed pending such review.

No serious question of law as to the procedure is presented by the briefs or was argued upon oral argument. The killing of Davis, while denied by the plea of not guilty, is not controverted, but was admitted by plaintiff in error while upon the witness stand in his own behalf. It is contended, however, that, at the time of the killing, plaintiff in error was insane and not legally responsible for his act, and evidence was introduced tending to support the contention. Counter evidence was introduced by the state tending to disprove the claim of insanity. The question of the sanity or insanity of a defendant in a criminal prosecution is, usually, largely a question of fact to be solved by the trial jury under proper instructions, yet in a case involving the life, or even the liberty, of a human being, the courts will not hesitate to look carefully into the evidence, and, if the verdict is not supported thereby, grant the needed relief or correct the error in such way as the condition of the proofs may suggest.

The bill of exceptions is quite voluminous, consisting of about 600 pages of typewritten matter. It has all been carefully read. The uncontroverted facts may be said to be that plaintiff in error is and was at the time of the tragedy an inmate of the Nebraska penitentiary, serving under a sentence imposed for a violation of the criminal

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law of the state, and was laboring in the broom factory then being carried on in the building. The decedent was the deputy warden, and was largely in charge of the discipline and control of the prisoners. A short time prior to the 11th day of February, 1912, plaintiff in error secreted a knife used in the broom factory and carried it to his cell, keeping it in his pocket. The date named was on a Sunday, and, when the inmates were assembled for the usual chapel exercises, he carried the knife with him into the chapel. The usual place of the deputy warden during the exercises was pretty well to the front in the audience, and near the close of the service it was his custom to pass down the aisle toward the entrance door through which the assembly would pass out. Plaintiff in error was seated near the aisle and not far from the door, and when the last hymn was being sung—the audience standing—the decedent walked down the aisle between the standing rows of men, and, when he came opposite and near plaintiff in error, plaintiff in error stabbed him a number of times in quick succession, and from which death soon after resulted. A guard approached plaintiff in error, to whom he surrendered the knife without resistance, and was led away and placed in the solitary confinement cell. He was a witness in his own behalf on the trial, and with commendable frankness admitted that he had made preparation to take the life of either the warden or the deputy, as opportunity might offer, and that in taking the life of the deputy he had carried out his previously conceived purpose and intention.

The evidence tends strongly to show that at one time, under a previous administration of the affairs of the prison, plaintiff in error was subjected to a long and, from his point of view, a cruel administration of discipline. The evidence shows that he had been guilty of an act of insubordination and defiance of authority, and it was necessary to maintain the rules and discipline of the prison; but, whether it was necessary to carry the punishment to the extreme to which it was carried, we are not

called upon to decide. The complaint made by plaintiff in error was that in the first instance he had violated no rule of the prison, and that he was never informed of what charges were against him, and does not know to this day, but that his whole treatment up to the time of the incident referred to was arbitrary, vindictive, tyrannical, and without cause. The testimony of the guard under whom he worked, called by the state, was that prior to that time plaintiff in error had been a faithful worker, pleasant, affable, and agreeable, and that he was obedient to the rules of the prison, causing no annoyance or trouble whatever.

There was considerable evidence offered by the defense that from that time his mental condition appeared to undergo a change; that he became "moody," absent-minded, and when not at work would sit, resting his head upon his hands, lamenting his fate, frequently saying the officers and guards "had it in for him," and would beat and otherwise mistreat him without cause. There seems to be little doubt but that during the administration of a subsequently appointed warden the management of some of the prisoners was cruel and brutal, and it was stated by the witnesses that this seemed to affect plaintiff in error's mind, he often referring to the treatment others had received, and which he deemed unreasonably harsh and severe; that during the later times, prior to the tragedy for the commission of which he was convicted, his mind seemed to wander; that his continuity of thought was impaired, and he could be induced to converse upon one subject for only a very short time, and his mind would "fly from one subject to another." Much of the evidence in his behalf was given by convicts and ex-convicts, while the opposite was maintained by the guards and some of the convicts yet serving time. It is gratifying to note that all the witnesses testified to a much more reasonable and humane system of government of the prison by the present warden and officers. The cruel and inhumane treatment of plaintiff in error and others, it is claimed, so weighed and preyed

upon his mind as to destroy his accountability for his acts, dethrone his judgment, and weaken his appreciation of the enormity of his act. He took the witness-stand in his own behalf and testified, with candor and intelligence, what he understood to be the moving cause of his own treatment and the treatment of others, and that he contemplated taking the life of the then warden or his deputy, and that he believed he would be doing right in the act, and believed he was doing right in taking the life of the deputy, for which he was being prosecuted. There seems to be no claim that he was otherwise than sane at the time of the trial. If we assume that the evidence offered on his behalf at the trial was all, or substantially all, true, it would be difficult to find any justification for the infliction of the death penalty.

Among the witnesses called by the state were certain physicians who were summoned to the bedside of the decedent, all of whom conversed with, or heard others converse with, plaintiff in error soon after the tragedy, and they all testified that they saw no indication or symptom of insanity during the conversations had; that he did not appear to be under any mental excitement, but conversed freely upon what he had done, and was ready and willing to receive punishment therefor. Two local alienists were called who made an examination of plaintiff in error during the trial, and both testified to the absence of any symptom of existing or previous insanity. Guards and others from the penitentiary testified on behalf of the state that they had discovered no symptoms of mental aberration in the conduct or manner of plaintiff in error either before or after the tragedy, and some deny the truth of the charges of needless cruelty to other prisoners; but it appears to be well established that such charges were made and believed in by the inmates, and that they were heard and believed by plaintiff in error.

The fact that a delusion existed, if such were the fact, would produce the same effect upon the party deluded as if the belief were based upon the real fact. The legal

presumption originally is that all people are sane, and that presumption continues until evidence to the contrary is introduced. That presumption applied to plaintiff in error in the first instance. Upon evidence being introduced to show mental derangement, it devolved upon the state to prove his sanity at the time of the commission of the act charged beyond a reasonable doubt. There is also a presumption that, where a state or condition is shown to exist, it continues until shown to have been removed. This applies to the mental condition of people. Judging by the evidence of the acts, conduct and manner of plaintiff in error, there may be some doubt whether his act was prompted by a diseased mind, or a desire for revenge as against the warden and deputy for acts of oppression and cruelty of which he deemed them guilty. If the former, he should not be held to the infliction of the extreme penalty. If the latter, there would be, in law, no extenuation. While these questions were largely for solution by the jury, yet, in the interest of human life, the duty of carefully considering the evidence is ultimately devolved upon the courts. From a consideration of all the evidence and a contemplation of the mainsprings of human conduct, it is the conviction and firm opinion of the writer hereof that plaintiff in error should not and cannot be held guiltless, but that he did not and does not deserve the taking of his life; but that he should be confined in the prison during his life as a protection to society, and that the sentence of the court should be reduced from execution to that of life imprisonment.

However, a majority of the court are of the opinion that there is no proper cause shown why the judgment of the district court should be interfered with, and it will therefore have to be affirmed. The time fixed by the district court for the execution of plaintiff in error having passed, it is ordered that the sentence be carried out on Friday, the twenty-first day of March, 1913.

AFFIRMED.

Mitchell v. Omaha Packing Co.

MIKE MITCHELL, APPELLEE, V. OMAHA PACKING COMPANY,
APPELLANT.

FILED NOVEMBER 27, 1912. No. 16,831.

1. **Master and Servant: VICE-PRINCIPAL.** Whether an employee occupies the position of a fellow-servant to another employee, or is the representative of the master, is not to be determined from the grade or rank of the offending or injured servant, but should be determined by the character of the act performed by the offending servant, by which another employee is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.
2. ———: **NEGLIGENCE: LIABILITY OF MASTER.** Where a master, instead of performing a duty which is personal to himself, directs an employee to perform that duty, he is liable for the neglect of that other, no matter what may be the position of the employee as to other matters.
3. **Appeal: INSTRUCTIONS: HARMLESS ERROR.** Where it clearly appears that the plaintiff in an action for personal injuries was not guilty of contributory negligence, the submission of that question to the jury by an erroneous instruction is error without prejudice to the rights of the defendant.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Greene, Breckenridge, Gurley & Woodrough, for appellant.

H. C. Murphy and *John P. Breen*, contra.

BARNES, J.

Action to recover damages for personal injuries sustained by plaintiff while in the employ of the defendant, the Omaha Packing Company. On the trial in the district court for Douglas county, the plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that the plaintiff and a native of Japan, called "Joe," on December 12, 1906, were working for the Omaha Packing Company, and were under the charge and

direction of one Aleck Romansky, who was night fireman of the defendant in its packing plant. The general duties of the plaintiff and Joe, hereafter called the Jap, were to bring coal to the boiler from cars that were set opposite the defendant's boiler house, to help pull the clinkers and ashes from under the boilers, to help Romansky swab the boiler flues, to wheel out the ashes and clinkers from the boiler house and deposit them in open railroad cars, which were set upon the tracks from time to time near the boiler house; that the defendant furnished a mechanical contrivance, called a "crane," for the purpose of elevating the ashes from the platform of the boiler house into the railroad cars; that the crane was broken, and, for three nights before the plaintiff received his injuries, he and the Jap had taken the ashes and clinkers out in wheelbarrows over a temporary runway and dumped them into the cars, which were set opposite the building for the purpose of receiving them. The cars were moved every day, which made it necessary to construct a new runway every night. On the night when the accident occurred, after the ashes and clinkers were taken out and cooled off, Romansky, who it is conceded was as to the defendant company a vice-principal, ordered the Jap to go out and construct a runway and platform to be used for the purpose of depositing the ashes and clinkers in the car. The Jap constructed such a runway and a platform out of materials which the defendant company had furnished and were at hand for that purpose. The runway appears to have been properly constructed, but the platform, which extended over the top of the open car, consisted of what is called a "grain door," which extended across the top, and from side to side thereof. This platform or grain door appears to have been thin in structure or so defective in its condition as to be unsafe for that purpose. Plaintiff testified that, when the Jap returned and stated that the runway and platform were ready for use, Romansky ordered him to wheel out the ashes and clinkers; that, when his third wheelbarrow load of clinkers struck the plat-

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form, the wheel of the barrow broke through it, and thus caused him to lose his balance; that he fell from the car to the track below, a distance of some ten feet, and he thereby sustained very serious injuries. He also testified that the runway was made of solid plank, and was suitable for that purpose; that the grain door which was used as a platform, as above stated, appeared in the dim light situated nearby to be sound and safe and all right. There was practically no conflict in the evidence. At the close of the testimony, defendant requested the court to direct the jury to return a verdict in its favor. This request was denied. The jury were instructed by the court, and afterwards returned a verdict for \$1,500 in favor of the plaintiff.

It is not claimed that the verdict is excessive, but it is strenuously contended that the court erred in not directing the jury to return a verdict for the defendant; and it is argued that the Jap and the plaintiff were fellow servants; that the defendant was not liable to the plaintiff for injuries received by reason of the negligence of his fellow servant. On the other hand, it is contended that, notwithstanding the fact that the plaintiff and the Jap were fellow servants in the performance of the general duties assigned to them, yet when the Jap, under the direction of his vice-principal, Romansky, constructed the runway and platform in question, he was acting for the company as vice-principal; that it was defendant's duty to furnish plaintiff with a reasonably safe place to work, and that duty could not be delegated to the plaintiff's fellow servant, and the defendant be thereby relieved from liability for the negligent performance of that duty.

It must be conceded that it was the duty of the defendant company to furnish the plaintiff with a reasonably safe place to work; that when the crane, which had been successfully used for elevating and dumping the ashes and clinkers into the railroad car was broken, or otherwise put out of commission, it was the duty of the defendant to supply another suitable and reasonably safe appliance

to be used for that purpose. It must also be conceded that if Romansky, who it is admitted was defendant's vice-principal, had constructed the runway and platform, his negligence would have rendered the company liable. Therefore, when Romansky delegated that duty to another, he thereby constituted him a vice-principal so far as the performance of that particular act was concerned; and such is the great weight of authority in this country.

In *Schroeder v. Flint & P. M. R. Co.*, 103 Mich. 213, it was said (quoting from *McKinney, Fellow Servants*, sec. 23): "The true test, it is believed, whether an employee occupies the position of a fellow servant to another employee, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employee is injured; or, in other words, *whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.*" The rule has been stated in another form, as follows: "If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such." *Northern P. R. Co. v. Peterson*, 162 U. S. 346. See *Robertson v. Chicago & E. R. Co.*, 146 Ind. 486; *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 87, 16 S. W. 924; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549.

For the foregoing reasons, we are of opinion that the court did not err in refusing defendant's request for a directed verdict.

Defendant contends that the district court erred in instructing the jury, in substance, that Romansky was a vice-principal over the Jap, who constructed the runway

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and platform in question, and while the Jap was engaged in that work he also acted as a vice-principal. The foregoing authorities effectually dispose of this contention, and error cannot be predicated on such an instruction.

Defendant further contends that the court erred in giving the eighth paragraph of his instructions, by which the jury were told, in substance, that one is charged with knowing that which he would have known under the circumstances, had he taken ordinary care and prudence to know, but he is not charged with knowing more than ordinary prudence required him to know. If the plaintiff actually knew of the condition of the platform as to quality, and still went on with his load, and that such act of so going was one of foolhardiness, then plaintiff cannot recover, as it would be a negligent act of a proximate nature leading to the injury. A workman, such as the plaintiff, has a right to repose some degree of confidence and reliance upon such structure erected by his principal for his use, and thereby to that extent is not charged with as close an inspection, as a duty towards himself, as if it were not so erected. But this does not admit of such employee closing his eyes or conscience to dangers that are apparent, but only a reasonable reliance under all attendant facts and circumstances as are known. By this, and other instructions, the court submitted the question of the plaintiff's contributory negligence to the jury. While this instruction is not to be commended, and in some cases might be erroneous, still under the facts disclosed by the evidence we are unable to see how it could have resulted in prejudice to any of the defendant's substantial rights.

It appears that a runway and platform had been constructed and used for at least two nights before the accident occurred; but on those occasions the grain door rested on a solid bed of ashes and cinders; while on the night in question the Jap constructed the platform without such solid foundation. The plaintiff testified that when he looked at the platform by a nearby light, which

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was to some extent insufficient to enable him to ascertain its condition, it appeared to be sound and all right. This testimony was not disputed by any one; and, when we consider the fact that the plaintiff and the Jap had therefore erected and used such a runway and platform with safety, it can hardly be said that the plaintiff was guilty of contributory negligence in assuming that the platform in question was safe and sufficient for the purpose for which it was constructed.

As we view the record, the evidence fails to disclose contributory negligence on the part of the plaintiff, and therefore the instruction complained of was error without prejudice.

We think the foregoing disposes of the questions which were presented in the argument of counsel for the defendant; and, finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

**IDA M. BEEBE, APPELLEE, V. SCOTT'S BLUFF COUNTY,
APPELLANT.**

FILED NOVEMBER 27, 1912. No. 16,850.

1. **Highways: MAINTENANCE: LIABILITY OF COUNTY.** The road law of this state does not require a county or municipality to guarantee the safety of its highways and streets, but it is required to keep them in a reasonably safe condition for public travel.
2. ———: ———: ———. For a county to allow an open ditch, nearly a mile in length, and from 6 to 8 feet wide, with a depth of from 26 to 34 inches, to be and remain for many years in the center of one of its public roads may render it liable for an injury caused thereby.
3. ———: ———: ———. Where injuries result to a traveler upon such highway, caused by the combined effect of the county's neglect and an accident, such as the sudden fright of an ordinary gentle farm team of horses, for which the driver is in no way to blame, the county is liable for the injuries thereby sustained.
4. **Appeal: INSTRUCTIONS: HARMLESS ERROR.** Where it clearly appears

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that the plaintiff in an action for personal injuries was not guilty of contributory negligence, the submission of that question to the jury by an erroneous instruction is error without prejudice to the defendant's rights.

APPEAL from the district court for Scott's Bluff county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

W. W. White and Morrow & Morrow, for appellant.

Wright & Duffie, contra.

BARNES, J.

Action to recover damages for personal injuries alleged to have been sustained by plaintiff while traveling upon a public road or highway, by reason of the failure of the defendant county to maintain the road in a reasonably safe condition for the public use. On the trial in the district court for Scott's Bluff county, the plaintiff had the verdict and judgment, and the defendant has appealed.

The record discloses that the highway or public road in question was established some time about the year 1893, and has been in use by the public ever since that time. It is situated on the section line running north and south between sections 13 and 14, township 22 north of range 56, in Scott's Bluff county, and there is a ditch, about a mile long, running along the section line and in the middle of the highway, which had existed and remained in that condition for many years; that the fences on each side of the section line had been moved back a distance of about 33 feet, the fence on the west side of the road being about 24 feet from the ditch. It appears that a traveled track existed on each side of the ditch, and on the 25th day of November, 1909, the plaintiff, with her husband and seven small children, was driving along this road in a two-seated carriage drawn by an ordinary farm team of gentle horses. They were traveling in the beaten track on the west side of the road, and between the ditch

and the fence. When they reached a point near to the residence of one Carr, the team, for some cause not clearly explained, became frightened, turned quickly to the east and ran into the ditch. The carriage was overturned and badly damaged, and the plaintiff was severely and permanently injured.

The defendant contends that the foregoing state of facts are insufficient to sustain the judgment, and in support of this contention cites section 6197, Ann. St. 1911, which reads as follows: "If special damage happens to any person, his team, carriage, or other property by means of insufficiency or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs to the same, and damages and costs shall be paid by the counties in proportion as they are liable for the repairs; provided, however, that such action was commenced within thirty (30) days of the time of said injury or damage occurring." It is argued that if there is any other cause concurring with the insufficiency or want of repair of a highway, which results in the damages complained of, to hold the county liable would be to extend its liability beyond that fixed by the statute. In support of this argument defendant cites *Bell v. Village of Wayne*, 123 Mich. 386, *Harris v. Inhabitants of Great Barrington*, 169 Mass. 271, *Schaeffer v. Jackson Township*, 150 Pa. St. 145, *Moore v. Inhabitants of Abbot*, 32 Me. 46, *Bartram v. Town of Sharon*, 71 Conn. 686, and other cases decided by the courts of those states, where the rule for which the defendant contends seems to have been adopted. We find, however, that the authorities are divided on this question. The courts of Iowa, Vermont, New York, Minnesota, and many other states hold that when two causes combine to produce an injury to a

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traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and some other occurrence for which neither are responsible, the municipality is liable, provided that the injury would not have been sustained but for such defect. *Langhammer v. Manchester*, 99 Ia. 295. In *Gould v. Schermer*, 101 Ia. 592, it was held that the mere fact that some other cause operates with the negligence of the defendant to produce the injury does not relieve the defendant from liability. His original wrong concurring with some other cause, and both operating proximately at the same time in producing the injury, makes him liable, whether the cause was one for which the defendant was responsible or not. The authorities on this question are collected in a note to *City of Denver v. Utzler*, 8 L. R. A. n. s. 77 (38 Colo. 300), where, at page 80, it is said: "And even those states which deny liability where the horse has become uncontrollable have modified the strictness of their rule somewhat by holding that a horse which which merely starts or shies to one side cannot be regarded as unmanageable or beyond the driver's control, so as to preclude him from recovering, where, because of such shying, the horse comes in contact with a defect or obstruction, and injury results."

In the instant case, it clearly appears that the county authorities knew that the ditch in question had existed in the center of the public road for many years, and had negligently permitted it to remain in that condition. It is also clear that the result was to render the traveled parts of the highway so narrow that it could not, under all conditions, be safely used by the traveling public. It is true that so long as nothing happened to the harness or vehicle in which a party was riding, so long as a well-broken horse exhibited its usual docility, one could travel along the path on the west side of the ditch, and within six or eight feet of it, safely. But it is well known to all that the horse, while probably one of the most docile and tractable of all our domestic animals, is the most subject

to fright, and a trivial cause will often startle him and render him, for the moment, uncontrollable. The nature of his movements at such a time cannot reasonably be anticipated, and when we consider his strength and agility it is not unreasonable to suppose that he cannot always be controlled. The defendant in this case, therefore, ought to have provided against the contingency which caused the plaintiff's injury.

To our minds, it seems clear that but for the existence of the ditch in question the plaintiff's husband could have controlled his team, and their sudden fright would not have resulted in any injury to the occupants of the carriage. The rule adopted by the trial court accords with the one adopted by a majority of the courts of this country, and we feel constrained to follow that rule. We therefore hold that one whose negligence has concurred with some other cause, both operating proximately at the same time in producing the injury, is liable therefor.

Defendant complains of the seventh paragraph of the court's instructions. By that instruction the jury were told, in substance, that, to render the defendant county liable for the injury complained of, the insufficient condition of the highway must have been the proximate cause of such injury; that if plaintiff's injury was sustained by reason of the team becoming beyond control of the driver, and such control of said team was for such a distance and such a time as shows that the uncontrollable condition of the team was the proximate and effective cause of plaintiff's injury, then their verdict should be for the defendant.

We have not quoted this instruction, but have attempted to give its substance as we understand it. It is not clear in expression, and is not to be commended. But, as we view the evidence, the defendant was clearly liable to the plaintiff for the injuries which she sustained. It is not contended that the judgment is excessive, and this case ought not to be reversed for a technical error of instructions. Finally, in any view of the case, it cannot be said

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that the instruction complained of resulted in any injustice to the defendant.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

MARY BUTLER, APPELLEE, V. JAMES B. SECRIST ET AL.,
APPELLANTS.

FILED NOVEMBER 27, 1912. No. 17,358.

1. **Limitation of Actions: PLEADING: AMENDMENT.** Service of summons in ejectment arrests the running of the statute of limitations in favor of a defendant who claims by adverse possession, though the form of action is subsequently changed by amendment of plaintiff's petition to a suit to redeem. *Butler v. Smith*, 84 Neb. 78, approved and followed.
2. **Appeal: CONSOLIDATION OF ACTIONS.** The consolidation of two actions pending in the same court, at the same time, against different defendants, to redeem from the lien of a mortgage, is a matter within the sound discretion of the trial court, and error cannot be predicated on the order of consolidation, unless an abuse of discretion is shown.

APPEAL from the district court for Knox county: AN-
SON A. WELCH, JUDGE. *Affirmed.*

Field, Ricketts & Ricketts, J. F. Green and W. A. Meserve, for appellants.

M. F. Harrington and W. R. Butler, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Knox county allowing the plaintiff to redeem a tract of land situated in that county from a void decree of foreclosure, and a finding of the amount which plaintiff should be required to pay the defendants for that purpose.

It appears that in January, 1890, one Ellis W. Wall owned the land in question, and mortgaged it to Pierce, Wright & Company for \$2,850. After giving the mort-

gage, Wall conveyed the premises to Clement L. Boone. Boone did not take the title by his initials, but took it by his real name as Clement L. Boone, and his deed was promptly recorded in the office of the county clerk of Knox county. In March, 1894, one Henry H. Drake, who had become the owner of the mortgage, brought a foreclosure suit in the district court for Knox county against Wall and his wife and C. L. Boone. The records in the office of the county clerk stated plainly that the land was owned by Clement L. Boone. Service was had by publication only. None of the defendants appeared, and a decree of foreclosure was granted. Thereafter the land was sold under the decree, and on May 24, 1895, the owner of the mortgage, who was the purchaser, took possession of the premises through one Green, and the purchaser and his successors in interest, the defendants in this action, have ever since retained such possession.

It further appears that the plaintiff obtained her title by quitclaim deed from Clement L. Boone, and mesne conveyances, and on the 11th day of March, 1905, commenced this action in the district court for Knox county as a suit in ejectment against James B. Secrist, Mary E. Secrist, and Susie M. Smith to obtain possession of a part of the land in question; that she also at the same time commenced an action in ejectment against Charles A. Kissinger and Emily Kissinger to obtain possession of the remainder of the mortgaged premises; that thereafter plaintiff was permitted to amend her petitions by changing the form of her actions to suits to redeem the land, and require the defendants to account for the rents and profits. Trials in the district court resulted in judgments for the defendants. From those judgments plaintiff appealed and obtained reversals in this court, and the causes were remanded to the district court for Knox county for further proceedings. For a more full and complete statement of the facts, reference may be had to *Butler v. Smith*, 84 Neb. 78. When those suits came on again for trial in the district court, an order was made consolidating them,

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and thereafter, upon the issues thus presented, a decree was rendered allowing the plaintiff to redeem, and fixing the amount necessary for such redemption. From that judgment the defendants have prosecuted separate appeals.

The record discloses that, upon the second trial in the district court, defendants Secrist and Smith interposed a plea of former adjudication, alleging that the judgment in their favor upon the former trial had never been reversed, and was a complete bar to the further prosecution of this action; while defendants Kissinger also entered a like plea, and contended that the judgment in their favor in the former action had never been reversed, and was a bar to the further prosecution of this suit against them. Their pleas of former adjudication were overruled, and this ruling is assigned as error.

It appears that, when the petition in *Butler v. Smith* was amended, Charles A. Kissinger and his wife, Emily, were made parties defendant in that action, all of the land involved in both actions was described therein, and plaintiff prayed to be allowed to redeem from the Wall mortgage as to all of the defendants. The defendants in that case all filed answers to the amended petition. The same course was pursued and like pleadings were filed in the original case of *Butler v. Kissinger*, and both actions were then pending in the district court for Knox county. Plaintiff thereupon filed a motion to consolidate the two actions, which was overruled. There was a separate trial of each of said actions, and a judgment rendered in each of them for all of the defendants. The plaintiff thereupon prosecuted appeals from said judgments. The appeals were docketed in this court against all of the defendants. The plaintiff was named as the appellant, and all of the defendants were made appellees. All of the defendants appeared and filed briefs, and, upon the hearings in this court, both of the judgments were reversed as to all of the defendants named in each case, and the causes were remanded to the district court for new trials. An exam-

ination of the record in the former cases fully disposes of the plea of former adjudication, and the judgment of the trial court on this point should be affirmed.

It is further contended that the court erred in overruling defendants' pleas of the statute of limitations. That question, however, was fully determined in *Butler v. Smith*, 84 Neb. 78, where it was said: "Service of summons in ejectment arrests the running of the statute of limitations in favor of a defendant who claims title by adverse possession, though the form of action is subsequently changed by amendment of plaintiff's petition to a suit to redeem." *McKeighan v. Hopkins*, 19 Neb. 33, was a suit in ejectment, and was changed by amendment to an action to redeem, and it was said by this court: "The plaintiff sought in the original petition to recover the land, because he was the owner thereof; and in the amended petition filed by him by leave of court he seeks to recover the land in question, upon the ground that he is the owner of the same; but, while asking equity he offers to do equity by paying the defendant all valid claims held by him against the land. The cause of action is the same, although the relief is sought in a different manner from that in the first petition. This, however, does not change the cause of action, and the statute of limitations ceased to run when the summons which was served on him was issued." In the instant case, the actions were commenced before the limitation had expired, and when commenced, although separate suits were brought, such actions were sufficient to toll the statute.

Error is predicated on the order of the district court consolidating the two actions for a single trial in the instant case, and it is argued that, because the court had once overruled a motion to consolidate the actions, it was error to thereafter sustain such a motion. A mere ruling on a motion during the progress of a cause is never *res judicata*, and it is within the sound discretion of the court to permit another motion to be filed and change its ruling. Unless the party complaining makes it appear that the

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trial court was thereby guilty of an abuse of discretion. error cannot be predicated thereon.

Finally, it may be said that, when the two causes were remanded for new trials, the only matter left for the determination of the district court was an accounting to determine the amount the plaintiff should be required to pay defendants in order to redeem the land in question from the mortgage lien. It is not contended that the court erred in determining the amount of redemption money, and the judgment of the district court is

AFFIRMED.

CHARLES A. KISSINGER ET AL., APPELLANTS, V. MARY BUTLER, APPELLEE.

FILED NOVEMBER 27, 1912. No. 17,357.

APPEAL from the district court for Knox county: ANSON A. WELCH, JUDGE. *Affirmed.*

Field, Ricketts & Ricketts, W. A. Meserve and J. F. Green, for appellants.

M. F. Harrington and W. R. Butler, contra.

BARNES, J.

This case presents the separate appeal of the Kissingers from the judgment of the district court in *Butler v. Sechrist, ante*, p. 506. The facts and questions of law in the two appeals are identical, and, for the reasons given in that case, the judgment of the district court is

AFFIRMED.

HENRIETTE SCHMIDT, APPELLEE, v. VILLAGE OF PAPILLION,
APPELLANT.

FILED NOVEMBER 27, 1912. No. 16,836.

1. **Appeal: RECORD.** Affidavits used on the hearing of a motion for a new trial cannot be considered in this court unless preserved in a bill of exceptions.
2. **Pleading.** Where a petition in an action for personal injuries sets out the facts, it is unnecessary to plead the legal conclusion to be drawn therefrom.
3. **Appeal: CONFLICTING EVIDENCE.** Where the verdict of a jury is reached upon conflicting evidence sufficient to sustain a recovery in favor of either party, this court will not disturb the verdict.

APPEAL from the district court for Sarpy county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

James T. Begley, for appellant.

William R. Patrick and *Ernest R. Ringo*, contra.

LETTON, J.

Action for damages for personal injuries alleged to have been received by falling upon a defective sidewalk in the village of Papillion. Plaintiff recovered a verdict and judgment for \$200. Defendant appeals.

There have been two trials of this case in the district court. At the close of the first trial a motion for a new trial was filed, which was granted by the court. This is assigned as error. The motion was submitted upon affidavits which are not preserved in the bill of exceptions. We must, therefore, presume the evidence justified the action of the district court in granting a new trial.

The defendant contends that the petition fails to state a cause of action. In substance, it pleads that the defendant is a municipal corporation; that the sidewalk along the east side of lots 1 and 2, in block 23, was in a

dangerous and defective condition, describing the same; that it was in that condition on the day of the accident and for several months prior thereto; that the plaintiff, while passing on the walk, tripped on one of the loosened boards, fell, and received the injuries described in the petition; that due notice was given to the village authorities of the accident; and that by reason of the injuries plaintiff has been damaged in the sum of \$1,500.

It is said the petition fails to charge negligence, a duty to repair, and neglect of the same, and that sufficient time has elapsed for the repairing; that it fails to charge notice of the defect, and due care on behalf of the plaintiff. When a petition sets out the facts, it is unnecessary to plead the legal conclusions to be drawn therefrom.

It is contended that the verdict is contrary to the evidence. The evidence on the part of defendant tends to prove that the walk was in a good state of repair at the time of the accident; that it had been inspected by the village authorities about four months before and found to be in good order; that it appeared to be sound, as far as any one could see, and that it was not until about four or five days after the accident that a loose board was discovered near the point where plaintiff fell. There was also testimony that plaintiff had said that the injury was caused by her tripping and falling between the sidewalk and the fence, striking her knee and hip on the edge of the walk, and not by falling forward as she testified at the trial. On the other hand, there is testimony that plaintiff fell from tripping on a loose or broken board; that the sidewalk at that point at the time of the accident, and for a number of months before, was in a defective and dangerous condition; that a part of the cross-boards were broken and loose; that it was shaky and had settled so that one side was lower than the other; that the stringers on which the boards were nailed were so rotten that nails would not hold therein and stuck up above the boards. The evidence being in this condition, it is apparent that we cannot interfere with the verdict of the jury.

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The charge of the court covers the issues presented, and we think the defendant has no cause to complain of the refusal to give the instruction requested.

We find no error in the record. The judgment of the district court is

AFFIRMED.

FRANK WILKINS, ADMINISTRATOR, APPELLEE, v. WATER & LIGHT COMPANY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED NOVEMBER 27, 1912. No. 16,852.

1. Master and Servant: ERECTION OF TELEPHONE POLES: NEGLIGENCE.

The poles and wires of an electric light company were placed in an alley some years previous to the erection of a telephone distributing pole about 2½ feet away on adjacent private property. The telephone wires were contained in an underground conduit in the form of a cable, and the cable was carried up the side of the telephone pole in a metal tube to the bottom of the cable box, which was nearly 30 feet from the ground. There was a platform on the pole 27 feet from the ground. The top of the pole was over 38 feet from the ground. The electric light poles were about 15 feet shorter than the telephone pole. The top cross-arm of the light pole carried two insulated and two uninsulated wires. The other cross-arms carried insulated wires. The bare wires were used as guard wires, and were not intended to carry electricity. The top of the cable box from which the telephone wires emerged for distribution was nearly 10 feet above the top of the light poles, and there was no opportunity for any of the wires of the telephone company to come in contact with the wires of the light company. *Held*, That these facts do not establish negligence on the part of the telephone company in placing its distributing pole in the position where it stood.

- 2. ———: NEGLIGENCE: ASSUMPTION OF RISK.** The doctrine of assumption of risk arises from the relation of master and servant, and does not constitute a defense where that relation does not exist between the parties.

- 3. Negligence: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** The question whether an employee of a telephone company is guilty of contributory negligence in ascending a telephone pole in proximity to an uninsulated wire belonging to an electric light company is a question of fact for the jury, where reasonable minds may differ as to whether ordinary prudence justified the act.

4. **Electricity: NEGLIGENCE.** Where the manager of an electric light company is informed that an uninsulated guard wire, which is strung upon poles belonging to that company in close proximity to a telephone distributing pole upon which workmen may reasonably be expected to go, has become charged with a heavy current of electricity from contact with other wires of that company carrying a heavy voltage, it is his duty to remedy the dangerous situation as soon as practicable, and a delay of over 36 hours in remedying the defect may constitute gross negligence on the part of the light company.

APPEAL from the district court for Otoe county: **HARVEY D. TRAVIS, JUDGE.** *Affirmed as to the Water & Light Company, and reversed as to the Nebraska Telephone Company.*

Greene & Breckenridge, Paul Jessen, Pitzer & Haycard and Edwin Zimmerer, for appellants.

Matthew Gering and John C. Watson, contra.

LETTON, J.

Action to recover for the death of plaintiff's intestate, Clinton Gilman. In the opinion, for convenience, the defendant Nebraska Telephone Company will be termed the Telephone Company, and the defendant Water & Light Company of Nebraska City the Light Company.

In the brief of the Telephone Company we find the following statement of facts: "The Water & Light Company of Nebraska City has a line of poles, in a certain alley in that city, along and upon which are strung two electric wires carrying a voltage of from 2,000 to 2,200 volts of electricity. These two wires are strung on the top cross-arm between two guard wires. There was also strung on these poles of the Water & Light Company a bare, uninsulated iron wire which had at one time been used as a signal wire in connection with a stand-pipe valve, and had been used on Sundays up to about March, 1908, for the transmission of a low voltage of electricity, and after that it served the Water & Light Company as a guard wire

to break the drops of individual telephone wires that were higher than the electric light wires. But this bare iron wire became 'crossed' or in contact with one of the high-tension wires, and thereby was unintentionally charged with some of the 2,000 or more volts of electricity which was by intention carried over the two high-tension wires supplying power and light to the customers of the Water & Light Company. The poles of the Water & Light Company have been located in this alley for a long time, and in October, 1909, had become somewhat sagged and out of plumb. As a matter of fact, one of the poles in the alley already mentioned, which for convenient and distinct designation will be spoken of as electric light poles, back of a certain restaurant known as Kastner's, leaned toward a pole of the Nebraska Telephone Company which was outside of the alley and on private property, so that the bare iron wire on the electric light pole already mentioned swung and rubbed against the telephone pole, and had apparently been in contact with the telephone pole at some time when through contact with the live electric wires it was carrying a high current of electricity, for the point of contact was plainly visible on the telephone pole. This iron wire was at a considerable distance above the ground. The telephone pole was about 30 feet high, and was used for the purpose of distributing the telephone wires to the customers of the Telephone Company in that locality. The telephone wires (which ran in an underground conduit) were carried up the side of the pole in a conduit or tube as far as the cable box. * * * The box projected over the property in which the pole was set, and not into the alley; and wires were distributed out of the cable box from the insulators at the cross-arm at the top of the pole to the places of business of the Telephone Company's patrons. The bare iron wire referred to was about 20 feet above the ground. It was not possible for any of appellant's telephone wires to come in contact with any wire of the Water & Light Company. * * * Clinton Gilman, the deceased, was an employee of the Telephone

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Company. He had formerly worked for the Water & Light Company, and had had some experience in working around telephone and electric light poles, and wires of both kinds. On October 4, 1909, and while working for the Telephone Company painting telephone poles, he got a shock by contact with this iron wire on the particular pole described in the testimony in the rear of Kastner's restaurant, which was the identical pole from which he fell the following Wednesday, receiving at that time the injuries which terminated his life. This wire had been cut at both ends. It was not used for the transmission of electricity at that time, and the fact that it was allowed to remain there in the situation in which Gilman found it on the afternoon of the day he received his injury created a condition which, it is claimed, was negligent as against the Water & Light Company. When this wire was charged with the electric current, it was through contact with the electric light wire of the Water & Light Company, and not through any crossing or contact of the high-tension wires of the Water & Light Company with any of the Nebraska Telephone Company's wires, none of which were involved in the accident or the cause of it."

Plaintiff concedes that this statement of facts is correct as far as it goes. The following additional facts seem to be established by the evidence. On the afternoon of Monday, October 4, 1909, and while working for the Telephone Company painting the ironwork on this pole, Gilman received a slight shock and was burned on the hand by touching this bare wire. He had been told that the wire was "hot" by another workman who had touched it that day when painting. This wire had become charged through coming in contact with another wire of the Light Company at a distance of a little more than a block away. Gilman, who was apparently much alarmed by the first shock, immediately reported the facts to George Bauman, the foreman of the Telephone Company, who directed him to cease working upon the pole. The foreman testifies that he immediately went to see Mr. Egan, the manager

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of the Light Company, and Egan promised to have the matter attended to at once or early the next morning. Egan says he promised to attend to the matter the next Sunday when there was no current on the wires. The next morning Gilman was told by the foreman of the Telephone Company of Egan's promise to make immediate repairs. The repairs were not made, and on Tuesday afternoon, October 5, Bauman told Gilman that he had been informed by employees of the Light Company that the cross had not been cleared. Nothing further was said to Gilman about this matter. On Wednesday forenoon Gilman was engaged in trimming trees. Bauman directed him in the afternoon to resume the work of painting. Bauman testifies: "Q. What did you say to him? A. I told him to go out and follow the work he had been doing. Q. Did you tell him to go to any particular place? A. No, sir. Q. What else did you say to him? A. The last words I said to him was: 'Clint, for Christ's sake be careful.'" Gilman and John Bauman left the shop together. Nothing was said by Gilman to indicate he was going back to work on this pole. Soon afterwards Gilman climbed the pole, and some few minutes after fell to the ground enveloped in flames. He died as a result of the accident.

In substance, the petition alleges that Gilman was employed by the Telephone Company as a lineman; that he was inexperienced and had no knowledge of the effect that contact between wires heavily charged with electricity or between such wires and metal would have; that it was his employer's duty to warn him as to the dangers incident to such work, to furnish him with a reasonably safe place to work, to place its poles at a reasonably safe distance from the wires of the Light Company whose poles and wires were in close proximity; that it was the duty of each of the defendants to keep their poles and wires so that the same would not cross, interfere, or come in contact, to keep them properly insulated and stretched so as not to permit them to sag and become loose; that the

Light Company permitted its wires to become loose so that they crossed and came in contact with the wires, poles and cable of the Telephone Company. It ascribes similar negligence to the other defendant. It further alleges that on October 4, 1909, Gilman reported to each of the defendants that the wires were crossed, and each of them promised to repair the same immediately, but negligently omitted to do so, and that Gilman, relying on the promise, on the 6th day of October, without any knowledge that the wire had not been repaired, attempted to work on a pole of the Telephone Company; that the wires were crossed which caused the accident, and that as a result Gilman died, leaving a widow and one minor child, aged five years, who were dependent upon him for support.

The answer of each defendant pleads that the risks of the service were obvious, and were understood, known to, and assumed by plaintiff, and also pleads contributory negligence on his part.

We will first consider the errors assigned by the Telephone Company. The principal complaint made by this defendant is that the court erred in overruling its motion for a directed verdict, for the following reasons: "(a) The testimony fails to show, and does not tend to prove, any negligence upon the part of the Nebraska Telephone Company which was the proximate cause of the injury resulting in the death of Clinton Gilman; (b) the evidence does not tend to establish why and how the injury to Clinton Gilman was received; (c) it is established that Clinton Gilman knew and appreciated the danger of his situation created by the proximity of the bare wire which was near to or abutting against the telephone pole described in the testimony, and that he assumed the risk of injury therefrom; * * * (e) the ground, as alleged in the petition and stated by plaintiff's counsel in his opening statement to the jury, that defendant's foreman promised and assured Gilman that the dangerous situation of which Gilman was informed, and which he re-

ported to the foreman, would be removed, is not sustained by the proof, nor does it appear in the evidence that he resumed his work relying on any promise of repair made by the Nebraska Telephone Company's foreman; but, to the contrary, he knew that the Telephone Company would not make such repair, and he knew, or had reason to believe, and feared that the danger still existed and that the wire was hot."

We cannot agree that the testimony does not show why and how the injury to Gilman was received. The circumstantial evidence upon this point is sufficient. But we are of the opinion that some of the other grounds upon which the motion was predicated are well taken. We think the evidence fails to show negligence on the part of the Telephone Company in placing its distributing pole where it did. The top of the pole was 38 feet 6 inches from the ground. The bottom of the platform thereon is 27 feet from the ground, and the point on the pole opposite the loose wire is 23 feet 4 inches from the ground. The top of the cable box from which the wires emerged for distribution was nearly 10 feet above the burned place on the pole, and hence there was no opportunity for any of the wires of the Telephone Company to come in contact with the wires of the Light Company, and, in fact, such a condition did not occur. There were two cross-arms on the Light Company's pole beneath the one which carried the dangerous wire, each carrying insulated wires charged with heavy currents. There is no proof that these wires were not properly insulated opposite the pole.

Gilman knew the danger of the situation created by the charged wire which had burned him. The promise which was made to remove the danger was not made to Gilman by his employer, the Telephone Company, but it was a promise made by the manager of the Light Company to the Telephone Company and communicated to him, and there is no proof that Gilman expected or anticipated that the removal of the cross would be made by the Telephone Company, or that he resumed work upon a promise made

by his foreman that the Telephone Company would remove the danger.

We are convinced that it was not negligence on the part of the Telephone Company to place the pole where it did for the purpose of distributing its wires, nor was this the proximate cause of the injury. Neither is it liable for a failure to warn Gilman of the danger, since he had been told by another employee and warned by the foreman of the danger of working on this pole on account of the proximity of the charged wire. There being no negligence on the part of this defendant, the motion should have been sustained. The other errors assigned by the Telephone Company we need not consider.

Taking up the points presented in the brief of the Light Company, several matters with respect to the admission of evidence are urged as being erroneous. The first is that the plaintiff was permitted to show that, after the accident, a piece of rubber hose had been placed over the bare wire at the place of the accident, and it is argued that to admit proof of subsequent repairs made by the employer is prejudicially erroneous. Unfortunately for this contention, no such evidence is in the record. It does appear (at one place without objection) that a piece of rubber hose had been nailed, after the accident, by the foreman of the Telephone Company upon the pole at a point opposite the bare wire. Since no change was made by the Light Company, this could not be prejudicial as against this defendant. Moreover, the jury were carefully instructed as to how far this evidence should be considered. As to the admission of evidence as to Gilman being usually a careful man, we think this could not affect the verdict, since all the facts as to his actions were before the jury.

It is next argued that the proof fails to show that the Light Company failed to perform any duty it owed to deceased, and that hence negligence on its part has not been proved. It is true that the duties of the Telephone Company and the Light Company to Gilman are not the

same. It is also true that, if there had been no telephone pole in that locality, the accident would not have happened, still the Telephone Company had the right to place its pole as it did. If the Light Company had not allowed its poles to lean, and its wire to sag, and negligently allowed a dangerous current to flow through the bare wire, the accident would not have happened. The Light Company knew of the proximity of this pole, with steps on each side, and with a platform and distributing box above the cross-arms and wires of the Light Company, and knew that men might be expected to work there with such tools and appliances as were needed. It owed the duty of exercising care either to insulate its wires at that point, or to see that vagrant and dangerous currents were not allowed to pass through its unused wires. *Olson v. Nebraska Telephone Co.*, 85 Neb. 331; *Atlanta Street R. Co. v. Owings*, 97 Ga. 663, 33 L. R. A. 798. Its manager recognized this duty by his promise to make repairs. The failure to do this was one of the proximate causes of the accident.

This defendant also pleads that Gilman assumed the risks of his employment, and hence that there is no liability on its part. The Light Company owed Gilman, as well as all other persons rightfully using the poles of the Telephone Company, the duty of using no negligence with respect to the upkeep of its wires and poles. The legal doctrine of the assumption of risk arises from the relation of master and servant. Since Gilman was not an employee of the Light Company, he assumed no risks as to the negligence of that company. Moreover, its promise to make immediate repairs had been communicated to him. This defense, therefore, is not available to the Light Company. The Light Company argues that there is no evidence that the wire was heavily charged, and that it may have carried no more than 110 volts. We cannot see that the intensity of the current is of much materiality in this connection. It is apparent that the uninsulated wire was charged with a current which might be dangerous to

workmen on the poles of the Telephone Company. The circumstantial evidence seems to show that Gilman's fall was caused by the metal of the paint pail forming a short circuit with the charged wire and the metal covering of the telephone cable on the side of the pole, thus causing the sudden flashing into fire and exploding of the paint, which was shown to be mineral paint containing turpentine and other highly inflammable ingredients.

The question whether Gilman was guilty of contributory negligence was submitted to the jury under carefully prepared instructions. They were also permitted a view of the scene of the accident. Whether Gilman was justified in attempting to climb the pole and pass the charged wire in order to reach the platform is a question as to which reasonable minds might differ. The question is a close one, but it is peculiarly one for the jury to determine. *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332; *Cudahy Packing Co. v. Wesolowski*, 75 Neb. 787; *Grimm v. Omaha Electric L. & P. Co.*, 79 Neb. 387. We think there is sufficient evidence to warrant a finding for the plaintiff on this point.

The case seems to have been carefully tried and all rights of the Light Company preserved. It was submitted to the jury upon a clear and lucid statement of the law in the instructions. The only prejudicial error we find is that the motion of the Telephone Company for a directed verdict should have been sustained.

The judgment is affirmed as to the Light Company, and is reversed as to the Telephone Company.

JUDGMENT ACCORDINGLY.

IN RE PARKER M. WICKSTRUM.

PARKER M. WICKSTRUM, APPELLANT, v. ERNEST HUNGER
ET AL., APPELLEES.

FILED NOVEMBER 27, 1912. No. 17,778.

Constitutional Law: CITY ORDINANCE: REGULATING USE OF MOTOR VEHICLES. A provision in a general ordinance of the city of Lincoln regulating the use of motor vehicles, that "it shall be unlawful for any person operating a motorcycle to carry another person on said machine in front of the operator," *held*, to be general with respect to all members of the class affected, to be based upon a reasonable classification, and to be a valid exercise of the police power of the city in protecting the safety of travelers on the city streets and persons carried on motorcycles.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Barton Green, for appellant.

F. C. Foster and *D. H. McClenahan*, *contra*.

LEITON, J.

Appellant was arrested and convicted of the violation of a city ordinance providing that "it shall be unlawful for any person operating a motorcycle to carry another person on said machine in front of the operator." This provision is embraced within a general ordinance regulating the use of motor vehicles in the city of Lincoln. Having failed to pay the fine and costs adjudged against him, he was committed to jail. He applied to the district court for release upon a writ of habeas corpus, on the ground that the ordinance was unreasonable and void, and from a denial of the writ he has appealed.

Summarily stated, his contention is that the ordinance arbitrarily invades personal rights; that a motorcycle is a type of motor vehicle which is no more dangerous to operate with a passenger in front than an ordinary electric automobile, which is usually a glass-inclosed cab in which passengers may occupy a seat directly in front of

the operator. From these facts he argues that where a restraining law or ordinance is against a class, or one type of a class, that type or class must be more dangerous than others, or legislation against it cannot be upheld. The testimony is that, when a person is carried in front of the operator upon a motorcycle, he sits between the handle bars of the machine, directly over the gasoline tank; that while, by leaning the body or moving the head to one side, the operator may see directly in front, the presence of the passenger obstructs the view to some extent. It is also shown that several instances have occurred of fuel tanks leaking and catching fire, and that in case of accident it is difficult or almost impossible for the person carried to get out from between the handle bars. It is also shown that such vehicles may be operated at a speed of from 30 to 60 miles an hour, and that upon wet pavements they are more likely to slip than four-wheeled vehicles.

The principles controlling the question presented are so well settled in this state as scarcely to require repetition: "Courts will not ordinarily inquire into the motive of a city council in its exercise of a discretionary power conferred upon it by the legislature." *Enders v. Friday*, 78 Neb. 510. In *Peterson v. State*, 79 Neb. 132, it is said: "It is a general rule that the determination of the question whether or not an ordinance is reasonably necessary for the protection of life and property within the city is committed in the first instance to the municipal authorities thereof by the legislature. When they have acted and passed an ordinance, it is presumptively valid, and, before a court will be justified in holding their action invalid, the unreasonableness or want of necessity of such measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred, by acting in an arbitrary manner." See, also, *In re Anderson*, 69 Neb. 686. We think there

is such a distinct difference between the operation of a motorcycle and of ordinary motor vehicles as to justify the enactment of the ordinance. Even if it be true that regulation in respect to passengers obstructing the view of the driver would be proper as to other classes of motor vehicles, perhaps the authorities have only made a beginning. It may be presumed that, if the city authorities become convinced of the necessity of further safeguarding the lives of the inhabitants of the city, they will take steps to do so. It seems clear that the provision complained of was intended to protect not only ordinary travelers on the streets from the danger that might accrue from the obstruction to the vision of the operator of such a speedy vehicle, but it was also intended to avoid the danger of accident to the person carried.

The ordinance is general with respect to all persons who operate motorcycles, and since it treats all members of that class alike, and the classification is founded upon a reasonable basis, it was within the power of the city council to adopt the same.

We find no error in the judgment of the district court, and it is, therefore,

AFFIRMED.

FRANK H. PARSONS, APPELLEE, v. JOHN T. CATHERS ET AL.
APPELLANTS.

FILED NOVEMBER 27, 1912. No. 16,817.

1. **Creditors' Suit: EXHAUSTION OF REMEDIES AT LAW.** For the purpose of maintaining a creditor's bill, proof of a judgment at law, of the issuance of an execution, and of a sheriff's return *nulla bona*, is sufficient, in the absence of fraud or collusion, to show that plaintiff's remedies at law have been exhausted.
2. ———: **PROPERTY SUBJECT: JUDGMENT AGAINST CITY.** In equity, the interest of a judgment debtor in a judgment against a city may, in a proper case, be subjected to the claim of his judgment creditor.
3. ———: **SALE OF COLLATERAL PENDING SUIT.** Failure of a court of equity to dismiss a creditor's bill, on an answer alleging that

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plaintiff has possession of unsold collateral security for his judgment, *held* not reversible error in a record which shows that plaintiff, before filing his reply, sold the collateral and applied the proceeds in part payment of his claim, that the case was tried on pleadings raising all the issues essential to an adjudication of the rights of the parties, and that no one was prejudiced by the procedure adopted by the trial court.

4. **Fraudulent Conveyances: EVIDENCE.** Decree upholding a conveyance from a husband to his wife *held* proper under the evidence, though assailed as fraudulent in a creditor's bill.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

J. O. Detweiler, for appellants.

Charles Battelle and J. F. Stout, contra.

ROSE, J.

This is a creditor's bill in which plaintiff seeks to collect a judgment for \$8,369.88, rendered August 14, 1909, in the district court for Douglas county, against John T. Cathers and others. The suit wherein the judgment was rendered was commenced April 28, 1894, and the liability of Cathers was that of surety on a promissory note for \$5,000, dated April 8, 1892, and payable to the McCague Savings Bank. Plaintiff succeeded to the rights of the payee. Execution was issued and returned "*nulla bona*." The property which the court is asked to subject to the payment of the judgment consists of three items: (1) A lot in Omaha, conveyed January 7, 1898, by Cathers to his wife, through a trustee, it being alleged that the conveyance was made without consideration, with the intent to hinder, delay and defraud plaintiff in collecting his claim against grantor. (2) Unpaid awards of \$1,245 against the city of Omaha in favor of the wife, the city having appropriated to public purposes part of the lot conveyed to her, and the amount recovered by her being the value of the property thus taken. (3) The interest of Cathers in two unpaid judgments against the city of

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Omaha, one rendered in favor of Anna J. Robinson, November 30, 1907, for \$1,640, and the other rendered in favor of Rhoda Gilliland, March 27, 1909, for \$1,500, Cathers having filed an attorney's lien for one-half of each of the two judgments. The principal debtors and Cathers and wife and other persons claiming an interest in the property in controversy are defendants herein. The answer contains a denial that the conveyance from Cathers to his wife was made without consideration, or to defraud plaintiff, or to hinder or delay him in collecting his claim. On the contrary, it is alleged that the conveyance was executed in good faith for the full consideration of \$5,087.92. Other matters pleaded in defense are that the creditor's bill was prematurely filed; that Cathers was a surety only; that plaintiff held as collateral security for the payment of his claim 20,000 shares of capital stock of the Colorado Gold, Silver & Lead Mining Company, property alleged to be of great value belonging to the principal debtors; and that the collateral described, though in control of plaintiff, was never sold or in any way applied to the payment of the note on which Cathers was surety. In a reply plaintiff states that on February 24, 1910, a date subsequent to the filing of the answer to the creditor's bill, he sold the collateral at public sale, after due notice, for \$100, and credited the proceeds on his judgment. The trial court upheld the conveyance from Cathers to his wife, and declined to apply the latter's awards against the city of Omaha on plaintiff's judgment, but subjected thereto the attorney's liens on the judgments against the city of Omaha. Cathers and wife appealed, and plaintiff filed a cross-appeal. After the record was filed in this court, Cathers died, and the case was revived in the name of his wife, Louisa E. Cathers, as administratrix of his estate.

Should the creditor's bill be dismissed because the action was prematurely brought? It is argued that relief was erroneously granted to plaintiff because his pleadings and proofs do not show that he exhausted his legal reme-

dies before bringing his suit in equity. This proposition is based on the assertion that property subject to execution was not sold before the filing of the creditor's bill. The record shows that plaintiff pleaded and proved his judgment, and that an execution was issued thereon and returned *nulla bona*. Nothing more could be done without the aid of equity. *First Nat. Bank v. Gibson*, 60 Neb. 767. Fraud or collusion on the part of the sheriff in performing his duties under the writ or in making his return is not shown. Under the circumstances plaintiff was not required to impeach the officer's return or to show by additional evidence that neither the principal debtors nor the surety had any property subject to execution. In absence of fraud or collusion on the part of the officer, the judgment, the execution and the sheriff's return were sufficient evidence that the remedy at law was inadequate. *Weaver v. Crossman*, 21 Neb. 675; *First Nat. Bank v. Gibson*, 60 Neb. 767; *Cochran v. Cochran*, 62 Neb. 450; *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309; *Howard v. Raymers*, 64 Neb. 213; *Coffield v. Parmenter*, 2 Neb. (Unof.) 42.

It is further argued that the funds burdened with the attorney's lien, while under the control of the city of Omaha, cannot be impounded or subjected to the payment of plaintiff's judgment. The city of Omaha is a defendant, and at the trial did not resist the making of an order directing payment of those funds to plaintiff. The statute creating a remedy in aid of execution provides: "Where a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any interest which he may have in any banking, turnpike, bridge, or other joint stock company, or any interest he may have in any money, contracts, claims, or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods, or effects which he may have in possession of any person, body-politic, or corporate, shall be subject to the payment of such judgment by proceedings in equity, or as in this chapter prescribed." Code, sec. 532. In direct terms the equitable

remedy extends to the interest of a judgment debtor in a judgment against a "body-politic, or corporate." The remedy in aid of execution does not exclude relief in equity. *Monroe v. Reid, Murdock & Co.*, 46 Neb. 316. It follows that this point, on the record presented, is not well taken.

Should the action be dismissed because plaintiff, before filing his creditor's bill, failed to sell the collateral security in his hands and apply the proceeds on his claim? That defense was pleaded in an answer filed by Cathers January 24, 1910. The court of equity had acquired jurisdiction. In a reply plaintiff alleged that he sold the collateral February 24, 1910, and applied the proceeds on his claim. Fraud or illegality in the sale is not shown. At the time of the trial, therefore, this feature of the defense had no existence as originally pleaded. The proceeds of the collateral paid a small part of the debt. Leivable property subject to execution and the collateral were wholly insufficient for the satisfaction of the judgment in favor of plaintiff, when the creditor's suit was tried. Equitable relief was not granted before the remedies at law had been exhausted. Had the suit been dismissed under these circumstances, the parties would necessarily have been burdened with the costs and expenses incident to the bringing and prosecuting of a second suit of the same nature as the first. In *Haffey v. Lynch*, 143 N. Y. 241, the court said: "Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action and adapt their relief to those conditions. The plaintiff, in an equity action, as a general rule, should not be turned out of court on account of any defense interposed to his action, if at the time of the trial the facts are such that, if he then commenced his action, he would be entitled to the equitable relief sought." For these reasons, the case having been tried below under pleadings raising all the issues essential to an adjudication of the rights of the parties, the action will not now be

dismissed, since no one was prejudiced by the trial court's procedure.

Was the conveyance from Cathers to his wife fraudulent? Roth testified that early in their married life the wife received from her father's estate, from a life insurance company, and from the sale of stock of the Chartiers Valley Railroad Company various sums of money aggregating several thousand dollars; that this money was turned over to the husband under an agreement to return it, and that he never did so until he deeded her the lot in controversy in fulfilment of his promise. Cathers testified, also, that the consideration mentioned in the deed was the amount received from his wife, with interest. There is proof that the wife, when she accepted the deed, had no knowledge of her husband's liability as surety; that the husband then thought his liability was fully protected by collateral security; that plaintiff, for many years, made no effort to bring his suit on the note to trial, and that Cathers, before, and two years after, the conveyance to his wife, retained in his own name title to a large tract of valuable land near Omaha. Plaintiff made no effort to contradict this testimony by direct proof. When it is all considered with the entire record, the trial court's finding against plaintiff on the issue of fraud in the conveyance from Cathers to his wife appears to be correct. It necessarily follows that plaintiff is not entitled to the awards against the city of Omaha for that part of grantee's lot taken for public purposes. There is no error apparent in the proceedings below. Neither appellants nor cross-appellant having obtained relief in this court, the costs here will be equally divided between them.

AFFIRMED.

WILLIAM KISER, APPELLEE, v. CHICAGO, BURLINGTON &
QUINCY RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 27, 1912. No. 16,864.

Carriers: DELAY IN SHIPMENT. Verdict against a carrier for damages
resulting from delay in transporting live stock to market held
sustained by the evidence.

APPEAL from the district court for Harlan county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

*Byron Clark, W. S. Morlan and Arthur R. Wells. for
appellant.*

John Everson, contra.

ROSE, J.

The suit was brought to recover damages in the sum of \$175.83 for defendant's delay in transporting a car of hogs loaded at Woodruff, Kansas, February 13, 1909, and delivered at St. Joseph, Missouri, too late for the market February 16, 1909. Plaintiff pleaded that the consignment, in the ordinary course of transportation, would have reached its destination in the morning of February 15, 1909; that defendant permitted the loaded car to stand on its track at Woodruff two days during stormy, cold weather, and that in consequence the hogs crowded together, 15 of them died, and the others depreciated in value. The answer contained a general denial; and an affirmative plea that plaintiff undertook to load the hogs and to care for them until they were taken away from Woodruff; that he put them into the car during a snow-storm, which increased in severity until it blockaded defendant's railroad; that by reason of the blockade defendant was unable to transport the car any earlier than it did; and that the delay and the resulting injuries were caused by the storm, and by want of ordinary care on part of plaintiff in loading the car when it was storming,

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and in failing to give the hogs proper care while they were at Woodruff. Plaintiff recovered a verdict and judgment for \$163.86. Defendant appealed.

The only question presented is the sufficiency of the evidence to sustain the verdict. There is no proof in the record except that adduced by plaintiff. It shows: Two stock trains a week, going eastward, ran out of Woodruff, one Wednesday at 4 o'clock in the morning, and the other at the same hour Sunday. At night there was no agent at the station. It was customary for the station agent to deliver the bill of lading Saturday evening for Sunday's shipment, for the shipper to load the car before 4 o'clock the next morning, and for the carrier to take it away shortly afterward. Defendant maintained stock-yards at Woodruff. About 5 o'clock Saturday afternoon, February 13, 1909, plaintiff put 80 hogs in the stock-yards, told the agent what he had done, where the hogs were to be shipped, and procured from him the same evening a bill of lading. Between 3 and 4 o'clock the next morning, plaintiff loaded the hogs into a stock car on defendant's track, and went home. The car was not moved until Monday evening, did not reach St. Joseph until Wednesday, and the consignment was injured in the manner pleaded in the petition.

Defendant argues these propositions to show the insufficiency of the evidence: There was no delay except at Woodruff. The consignment was picked up by the first train going east. Plaintiff undertook to care for the hogs during the delay. He failed to prove that they were delivered to defendant for shipment before the car was taken away.

Defendant's view of the evidence relating to the delivery is not the only reasonable one. Plaintiff testified in substance: There was no agreement on his part to care for the hogs or to furnish a caretaker at the station or en route. He learned about 10 o'clock Sunday morning that the car had not been taken away. He promptly went to the station, found some of the hogs dead, reported the con-

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ditions to the agent, under his direction nailed grain doors on the car to protect the rest of the hogs from the storm, and afterward bedded and fed them. The proof of these facts, when considered with the entire record, is sufficient to sustain findings that the hogs would have had less protection from the storm in defendant's stock-yards than they had in the car; that what plaintiff did to protect and care for them was done by direction of the station agent; and that plaintiff surrendered full control over the hogs for the purpose of shipment when he loaded them.

It is also argued that the evidence is insufficient for the following reasons: The hogs had proper care at Woodruff. There was no delay elsewhere. Defendant was prevented by an unprecedented snowstorm from starting the shipment sooner.

The last conclusion thus stated by defendant is not a necessary deduction from the proofs. The testimony relating to the storm is meager. Plaintiff said it was storming some when he got the bill of lading, and that it was snowing quite a little and blowing when he loaded the car. He also said he was told about noon Sunday that one of defendant's engines was stuck in a drift west of Woodruff. Neither the place nor the distance west was shown. This comes far short of proving an unprecedented storm which excused the delay in shipping the hogs, though plaintiff never before had a similar experience. There is no evidence that defendant's road was blockaded between Woodruff and St. Joseph, or that the car could not have been taken out promptly by an engine or train from the east.

A sufficient reason for setting aside the verdict has not been given, and the judgment is

AFFIRMED.

GEORGE P. CRONK, APPELLEE, v. CORA L. CRONK,
APPELLANT.

FILED NOVEMBER 27, 1912. No. 17,024.

Divorce: EXTREME CRUELTY. Decree granting a husband a divorce on the ground of extreme cruelty affirmed as a proper disposition of the case under the evidence.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

W. W. Slabaugh and G. W. Shields, for appellant.

Crane & Boucher and A. W. Jefferis, contra.

ROSE, J.

The parties are husband and wife. The husband is plaintiff, and the trial court granted him a divorce on the ground of extreme cruelty. The wife appeals, and insists that under the evidence the divorce should not have been granted.

They were married September 18, 1906, and the suit was commenced June 20, 1910. The intervening time was full of sensation and scandal. Both had been previously married and divorced. They lived in Omaha. Evidence relating to what occurred after they became husband and wife fairly establishes the following facts: Defendant accused her husband of marital infidelity, and at the trial was unable to prove her charges, though she had previously given them wide publicity. She clandestinely took his watch and other articles of personal property and pawned them to secure money for herself. She accepted from her husband money and transportation for a trip to Virginia to visit her relatives, and consented to his going to California at the same time to visit his children by a former wife. After he left Omaha pursuant to this understanding, she secretly followed him and spied upon him

while he was visiting with his children at Long Beach. She falsely intimated to police officers there and at Los Angeles that her husband was having improper relations with his former wife and importuned them to arrest him. In California she deliberately gave newspaper publicity to her simulated wrongs, and made him and his children the subjects of sensational notoriety and scandal. In Omaha she went before the grand jury, falsely charged him with wife-desertion and nonsupport, and attempted to have him arrested. She directed public attention to her scandalous relations with her husband by hurrying after him in the public streets of Omaha, by calling to him, and by giving publicity to her unfounded suspicions. She went personally to eminent citizens who were fraternal brethren of her husband and falsely accused him of desertion and nonsupport, with a view to having him investigated by his lodge and disgraced. She was wholly unable to disprove this conduct. In some form it was often repeated. It was deliberately planned and appeared to get worse. There is convincing proof that it robbed her husband of his peace of mind, made his marital relations intolerable, and seriously impaired his health. It amounted to extreme cruelty within the meaning of the divorce laws. His conduct is assailed by his wife, but the proofs do not justify a finding that he was guilty of such misconduct as would warrant a court of equity in dismissing his suit on that ground.

Defendant offered a vast amount of testimony to establish condonation. If full credence could be given to the witnesses who testified in favor of defendant on that issue, the defense might be established, but the trial court, under all the circumstances, properly disbelieved their testimony on material matters. After the alleged condonation, defendant's conduct was more cruel than before. A careful consideration of the entire record leads to the conclusion that the findings below were right and that the divorce was properly granted. An analysis of the evidence would not benefit the parties nor improve the litera-

ture of the court. It has all been carefully examined, however, and the decree below is adopted as correct.

AFFIRMED.

REESE, C. J., dissenting.

Having read the abstract containing the proceedings upon the supplemental hearing, I am compelled to dissent from the opinion of the majority in this case. After the submission of the case to the district court, quite a lengthy memorandum opinion was written and filed by the judge who heard and decided the case. A portion of that opinion impresses me most strongly. After discussing another feature of the case, the court says: "But apart from this, what seems to be improbable in plaintiff's testimony is that these persons should be together even as much as plaintiff admits they were, and under the circumstances they were, and yet at no time were familiarities of any nature indulged in, or even suggested, as plaintiff testifies. Knowing these parties as I do and have come to know them since this litigation commenced, particularly the defendant, and knowing as I do that her persistent and almost unceasing effort and object has been to reinstall herself in her husband's favor, whether for good or evil, I need not now say, I can scarcely conceive it possible for these two persons to have been together for even as much as nine nights from 7 or 7:30 to 10 or 11 o'clock, according to plaintiff's testimony, or much later, according to defendant's testimony, in a room alone, and yet neither, at any time, having made any advances of familiarity to the other; that at no time throughout the entire series of visits did anything occur between them but what might be expected to occur between two strangers. Such a thing, of course, was possible, but, in the very nature of things, it seems to me it would not be probable."

There are many things stated in the opinion which reflect strongly upon the conduct and character of defendant, and which are probably merited, but for the purpose

of this dissent need not be set out. The question submitted upon this supplemental hearing was whether there had been a condonation after the rendition of the decree of divorce in favor of plaintiff, the husband. It is alleged by defendant that after the decree was rendered, and while the cause was pending in the supreme court on appeal, the parties became reconciled, lived and cohabited together as husband and wife. There was a mass of evidence introduced, aside from the direct and positive testimony of defendant, which tended to establish that fact. The testimony of plaintiff, in denial of the statements of defendant and her witnesses, is equally strong and emphatic, and yet he shows by his own statements that he was often in the room of defendant of evenings, but seeks to explain his presence there by testifying that those visits were at the solicitation of defendant for the purpose of advising her upon matters of her business upon which she was considering, and, in part at least, in which she was engaging. The consideration of this mass of evidence, the knowledge of both parties as gained by the same judge upon the hearing of the trial of the principal case, no doubt prompted the remarks by the court above quoted. It was but the measurement of both parties, applied after their vile lives had been uncovered and laid bare to the court, and which forced the judicial mind to the announcement made.

It is shown that this is the third matrimonial venture by plaintiff and the second by defendant, each made possible by the divorce route, now much traveled to the disgrace of the American people. Near the close of the opinion the district court makes use of the following language: "Again, speaking for the state as a party to these proceedings, so much of crimination and recrimination already has been indulged in between these parties that I am satisfied no good could possibly result from any attempt at reunion. Better, far better, and now more than ever, both for themselves and the public, that these persons be divorced and this tiresome and unprofitable litigation

end." To this doctrine I cannot agree. The legitimate conclusion to be drawn, though not so intended by the court, must be that, since the parties have so far graduated in sin and uncleanness and by their "crimination and recrimination" have laid open to the public gaze the immorality of the life of each, and that owing to that fact "no good could possibly result from any attempt at reunion," therefore it would be "better, far better, and now more than ever, both for themselves and the public," that they be divorced, and "this tiresome and unprofitable litigation end." Judging the future by the past in the lives of these two people, I fear the decree would not have that salutary effect. On the contrary, each would thereby be turned loose upon society with the legal right to embark in new matrimonial schemes with other parties, much to the enjoyment, doubtless, of these litigants, but to the disgrace of the state and the crushing of the hopes and hearts of others.

The divorce laws were never intended for such abuses. Since divorces have been granted, in the earliest days, they have only been intended for the protection of the innocent, but never as a reward for wrongs and crimes committed. Where each party is guilty of such conduct as might be grounds for divorce for one, had the applicant been innocent, it was never intended that the sacred bond of marriage should be severed because both were guilty. It does not follow that, because a reunion is rendered improbable by reason of the iniquities of both parties, a divorce should be granted in order that they may form "unions" with others, and in and by which the disgraceful courses of life may be further pursued in fresher and greener fields. This is the teaching of the whole theory of the divorce laws of this country. To my mind it is clear as the noonday sun that this divorce should not be granted to either party. Neither is entitled to it, and neither should receive it. If they do not desire to be reunited, they can remain separate, but should never be permitted to contaminate other lives under the guise of "holy matri-

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mony." For these reasons, the whole proceeding should be dismissed, and the merited and unqualified condemnation of the court placed upon it.

FAWCETT, J., concurs in the dissent.

SINGER SEWING MACHINE COMPANY, APPELLANT, v. JOHN
L. BARGER ET AL., APPELLEES.

FILED NOVEMBER 27, 1912. No. 16,830.

1. **Principal and Agent: DISAFFIRMANCE OF ACTS OF AGENT.** "A principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge, or he will be bound thereby." *Farmers & Merchants Bank v. Farmers & Merchants Nat. Bank*, 49 Neb. 379.
2. —: **RATIFICATION OF ACTS OF AGENT.** Where, in settlement of a balance due upon the sale of a sewing machine, what is termed a "single payment note" is given by the purchaser for such balance, and said note provides that the machine is to remain the property of the seller until full payment of the purchase money, and the holder of such note, with notice that it has been altered by raising the amount, brings an action of replevin upon the note in its altered condition, and endeavors to recover in such action, he thereby ratifies the act of alteration.
3. —: **ALTERATION OF NOTE BY AGENT.** And, in such a case, if it is established that such note was altered by the agent of the holder, who sold the machine and obtained the note from the purchasers, after the latter had signed the same and without their knowledge or consent, the plaintiff in such action cannot recover.

APPEAL from the district court for Cedar county: GUY
T. GRAVES, JUDGE. *Affirmed.*

Claude S. Wilson, for appellant.

J. C. Robinson, contra.

FAWCETT, J.

This is an action of replevin brought in justice court in

Cedar county and appealed to the district court for that county. From a judgment in favor of defendants, plaintiff appeals.

The property replevied was a sewing machine sold by plaintiff through its agent, Poole, to the defendants. The evidence shows that the price fixed upon the machine was \$60; that plaintiff took as part payment an old machine, and, according to the testimony of defendants, was to receive \$35 in addition, of which \$5 in cash was paid at the time. Poole testified that defendants were to pay \$39, and paid \$5 in cash at the time. What is termed a "single payment note" was signed by defendants and delivered to Poole. This note provided for the payment of the difference between the two machines one year after date, and also provided that the machine, for the purchase money of which the note was given, should remain the property of the company until full payment of the purchase money, with interest and costs. Defendants testified that when they signed the note it was drawn for the sum of \$30. When the note was about to mature, it was sent to a bank for collection. Defendants were notified of that fact, and were requested to make payment at the bank, the notice stating that the note was for \$34. The defendant John L. Barger went to the bank and asked to see the note, stating that there must be something wrong about it. When the note was shown to him, he at once stated that the amount of the note had been raised from \$30 to \$34, and refused to pay it, stating that he was willing to pay the \$30, but would not pay any more. The bank reported to plaintiff what had been said, and received in return a letter from plaintiff, in which it is said: "We accepted this note with a balance of \$34 and had no thought but what it was correct. If Mr. and Mrs. Barger say they were to pay only a \$30 balance you may collect same and we will settle with our Mr. Poole. Kindly make arrangements with Mr. Barger to let us have the note to help us make our settlement." When notified of the statement of plaintiff, defendant refused to pay the \$30, and

upon the trial gave as his reason for such refusal that he was not willing to pay the \$30 unless he got his note. Some time later a representative of plaintiff called at the home of the defendants and demanded payment of the \$34, and, upon payment being refused, said he was going to take the machine. This the defendants would not permit him to do. The next step in the matter was when another agent of plaintiff, with a constable, called at the home of defendants and again demanded payment of the note. Defendants refused to make payment, giving as their reason the raising of the note from \$30 to \$34. Plaintiff's agent thereupon offered to take the \$30 in settlement of the matter, and he testified that he made that offer without adding anything for costs. This testimony is contradicted by defendants, who state that he only offered to take the \$30 on condition that they would pay the expenses of himself and the officer for coming after the machine, which amounted to something like \$6, which defendants refused to do. Thereupon the constable served the writ of replevin in this action and took the machine.

Upon the trial defendants both testified unequivocally that at the time they signed the note it was drawn for \$30. The note shows upon its face that the word "four" must have been written into the note after the word "thirty," after the note had been drawn. An examination of the original note, which is before us, shows that as originally drawn it read "thirty no-100 dollars." Subsequently there was written in between the word "thirty" and the "no-100 dollars" the word "four." That this was written in afterwards is evident from the manner in which the last letter of the word "four" is crowded up against the line between the word "no" and the figures "100." Plaintiff's agent admits that he wrote the word "four" in after the other part was written, and explains his act in doing so by testifying that the defendants were to pay \$9 in cash and give a note for \$30, and that after he had the body of the note written, but before writing the figures \$34 in the

upper left-hand corner thereof, defendants said they only had \$5 cash on hand; that he thereupon agreed to accept the \$5, and raised the note to \$34 before it was signed by defendants. This testimony is positively contradicted by both defendants, who say that there never was any talk about \$9 or \$39, but that the amount was to be \$35, \$5 in cash and a note for \$30. Counsel for plaintiff in his brief says: "The question then reduces itself to two propositions: (1) Has the contract been altered since it was signed? and, if so, (2) what effect has such alteration had upon the rights of the parties to this action?" He then concedes that there were only three persons present, viz., Poole and the two defendants, and then says: "The contract shows no alteration upon its face; and, while appellant still contends that the same had not been altered, yet, inasmuch as a jury found against the appellant upon conflicting evidence, we realize that it would be a waste of time to argue to this court that phase of the question. For the sake of argument, then, let us concede that said contract was altered as alleged; we still contend that the judgment of the district court must be reversed."

In the light of the admissions of counsel, which are eminently proper in the face of the record, his contention must fail. It is argued, and authorities cited in support of the argument, that where an agent has no authority, either express or implied, to make an alteration of the character under consideration, it is simply a spoliation by a stranger to the contract, and does not impair the validity as it originally stood. The trouble with plaintiff's contention and with his authorities is that they do not fit the facts established at the trial. We think the rule of law applicable here is that if the alteration is made by an agent, while in the transaction of the principal's business and within the scope of his authority, then the act of the agent is the act of the principal. The cases supporting this rule are numerous and hardly call for citation. Among them may be noted authorities cited in defendants' brief, among which are *Kingan & Co., Limited, v. Silvers*, 13

Ind. App. 80; Mechem, Law of Agency, sec. 739; *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 5 Pac. 142; *Law v. Grant*, 37 Wis. 548, reaffirmed in *Matteson v. Rice*, 113 Wis. 328; *Rhomberg v. Avenarius*, 135 Ia. 176. We think in this case the act of Poole, who, the evidence shows, was "managing salesman" of the plaintiff, and made the alteration while engaged in the service of the plaintiff in this particular transaction, is sufficient to bind the plaintiff.

But, even if this were not so, there is another rule of law from which we are unable to see any escape by plaintiff. The evidence shows that, after plaintiff had due notice of the alteration of the note, it failed to disaffirm the unauthorized act of its agent, but, on the contrary, affirmed his action by taking the machine in a replevin action, under the authority given by the altered note. It being established by the verdict of the jury that the note had been altered, it was void in its entirety, and plaintiff obtained no rights under it. Without that document to aid it, plaintiff had no authority to take the sewing machine, for, if no valid contract, in the terms and of the kind relied upon, was ever signed by defendants, then the transaction between plaintiff and defendants was simply an ordinary sale of a sewing machine on one year's time. By such a sale plaintiff would part with its title to the machine, and its only legal remedy, in the event of a failure by defendants to pay the balance due, would be by an ordinary action at law and a collection upon execution. "A principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge, or he will be bound thereby." *Farmers & Merchants Bank v. Farmers & Merchants Nat. Bank*, 49 Neb. 379. "The acceptance or retention by the principal, after knowledge of the facts, of the fruits of an unauthorized act of an agent is a ratification of the agent's act, and it relates back to the time of the act and makes it as if the agent had been empowered to perform it at its date, and the principal is bound in all respects as if he himself had been the actor." *Johnston v. Milwaukee &*

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Wyoming Investment Co., 49 Neb. 68. "When the holder of a note had notice that it had been altered by changing the amount, and with such notice sued upon it in its altered condition, and endeavored to recover thereon, *held*, that he thereby ratified the act of alteration, and that the court did not err in refusing to permit him, after trial, to amend by counting on the note as originally made." *Perkins Windmill & Ax Co. v. Tillman*, 55 Neb. 652. "A principal must adopt the unauthorized contract of his agent as a whole, or not at all. He cannot adopt the portion that is beneficial and reject the remainder." *Citizens State Bank v. Pence*, 59 Neb. 579.

It is contended that the court erred in giving instruction No. 2. In that instruction the jury were told that the burden was upon the plaintiff to prove every material allegation contained in its petition, and, if the jury found the evidence bearing upon any material allegation was evenly balanced, or that it preponderated in favor of defendants, plaintiff could not recover. The instruction is not open to the construction placed upon it by plaintiff. It is next contended that the court erred in giving instruction No. 6. This instruction should be considered in connection with No. 5, and when so considered it is free from error. It is further urged that the court erred in not giving instruction No. 1, requested by plaintiff, as follows: "You are instructed that if you find from the evidence, exclusive of the written instrument in question, that at the time of the commencement of this action the title and right of possession of the property replevied was in the plaintiff, then your verdict should be for the plaintiff, regardless of any alleged alteration in the written contract." This instruction was clearly bad, and was properly refused. No right of possession of the property replevied had been shown, "exclusive of the written instrument in question."

The verdict of the jury being conclusive as to the fact that the note was materially altered after its execution by the defendants, and plaintiff having ratified the unau-

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thorized act of its agent by bringing this action upon such fraudulent note, the trial court did not err in overruling the motion for a new trial and entering judgment upon the verdict.

AFFIRMED.

**JOHN M. DINEEN, APPELLANT, v. WILLIAM H. LANNING,
APPELLEE.**

FILED NOVEMBER 27, 1912. No. 16,855.

1. **Deeds: DEED TO PARTNERSHIP: EFFECT.** A deed to a partnership in its firm name is not void, but vests an equitable estate in the firm for the benefit, first, of the partnership business and creditors, and, second, of the members of such partnership.
2. **Abatement: DEATH OF PARTNER.** And where a mortgage antedating such deed is foreclosed, and in the suit for foreclosure the partnership and all of the members thereof are made parties, and summons is served upon such members, and after such service one of the members dies, the suit does not thereby abate, but may be prosecuted to final decree against the other members as surviving partners.
3. ———: ———: **DISMISSAL AS TO DECEASED PARTNER.** Nor does the fact that at the time of entering the decree plaintiff requests and obtains an entry of dismissal as to such deceased member operate as an abatement of the suit.
4. **Partnership: FORECLOSURE OF MORTGAGE: SERVICE OF SUMMONS.** Nor would the fact that the partnership, as a separate entity, had not been served with summons affect the validity of the decree in such suit as to the equitable interest of the members of the partnership who were served. Such members would be bound by the decree, and a sale of the real estate thereunder, duly confirmed, would divest them of such interest, and the same would pass by the sheriff's deed to the purchaser at such sale.

APPEAL from the district court for Box Butte county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

M. S. McDuffee, for appellant.

Albert W. Crites, contra.

FAWCETT, J.

From a judgment of the district court for Box Butte county, dismissing plaintiff's suit for a partition of the northeast quarter of section 30, township 26, range 47 west of the sixth P. M., in said county, plaintiff appeals.

On February 1, 1888, one William H. Wareham, who was the then owner of the land in controversy, his wife joining him, executed and delivered to defendant Lanning a mortgage upon the land. Thereafter, by mesne conveyances, the title reached one Harvey Myers, who on February 27, 1892, by warranty deed, conveyed the land to Job Hathaway & Company, subject to defendant's mortgage. The company failing to pay the taxes, the county treasurer sold the same for delinquent taxes to one Virgil Young. On October 4, 1902, Young commenced suit to foreclose his tax lien, in which suit "Job Hathaway & Company, a firm composed of Job Hathaway and Emma C. J. Austin," and Job Hathaway, Emma C. J. Austin, and the present defendant, William H. Lanning, with others, were made defendants. Defendant Lanning filed an answer and cross-petition in that suit for a foreclosure of his mortgage. The files of the district court in that case were introduced in evidence in this. They show that due service was had upon Job Hathaway and Emma C. J. Austin, but the return of the officer does not show any attempt at a formal service upon Job Hathaway & Company as a separate entity. The uncontradicted evidence shows that the copartnership of Job Hathaway & Company consisted of Job Hathaway and Emma C. J. Austin, as equal partners. The decree entered in that case contained the following recital: "Be it remembered, that on this 18th day of February, 1903, this cause came on to be heard before the court, the plaintiff appearing by Wm. Mitchell, his attorney, the defendant, W. H. Lanning, appearing by W. G. Simonson, his attorney, the plaintiff asks to dismiss this case against Job Hathaway and Annie L. Hathaway, wife of Job Hathaway, a member of defendant firm Job

Hathaway & Company, and wife of Job Hathaway, defendant, defendants, and same is hereby dismissed." Thereupon a default was entered against all of the other defendants named in plaintiff's petition, except defendant Lanning. The decree found the proceedings in the case to be regular; found the lien of plaintiff under his tax sale certificate to be a first lien, and the mortgage of defendant Lanning to be a second lien; decreed a foreclosure of the same, and awarded an order of sale therefor. The sale was duly advertised and made. Defendant Lanning was the purchaser at the sale, and upon due confirmation of the sale received the sheriff's deed for the land. At the time of entering the decree above referred to, Job Hathaway was dead; his death having occurred during the interval between the service of summons and the date of the entry of the decree.

The main contentions by plaintiff for a reversal are: A copartnership, as such, cannot take title to real property; that the copartnership, as such, was not served with summons in the foreclosure suit; that the conveyance from Myers to Job Hathaway & Company was a conveyance to Job Hathaway, individually, clothed with a trust in favor of the copartnership; that upon the dissolution of the copartnership Job Hathaway became the owner of one moiety and trustee for the other moiety; that in land purchased by partners with partnership funds partners are tenants in common, unless real estate is needed for partnership purposes; that real estate belonging to a partnership, but standing in the name of one partner only, may be partitioned; that the heirs of Job Hathaway could have partitioned unless there is a good defense appearing affirmatively, and so can the appellant who has succeeded to all rights of the heirs of Job Hathaway; that the copartnership was dissolved in 1892, and that by the recital in the decree in the foreclosure suit, above set out, the action was dismissed as to Job Hathaway, and that when he died in October, 1902, after service had been had upon him, the action abated, and, never having been revived, his

heirs, after his decease, were necessary parties to that action. We will not attempt to discuss the above points *seriatim*, but will consider them together.

We do not think the deed to the copartnership was a conveyance to Job Hathaway, individually. Conceding that the deed to Job Hathaway & Company was ineffective to lodge the legal title to the land in the copartnership (*Barber v. Crowell*, 55 Neb. 571), it did vest an equitable estate in the firm (30 Cyc. 431, 432, and authorities cited in notes 42, 43).

The death of Job Hathaway, after service upon him and prior to the decree, did not abate the suit. *Union P. R. Co. v. Metcalf*, 50 Neb. 452, was an action by Metcalf & Wood, a firm composed of Metcalf and Wood. On page 457 of the opinion it is said: "Finally, it was pleaded that if there was any such firm as Metcalf & Wood it had, since the commencement of the action, been dissolved by the death of Lafayette Metcalf, and that by reason thereof the action had abated." On page 458 it is said: "We have quite recently held, following well-established principles, that on the death of a partner the assets and choses in action of the partnership vest in the survivor. *Lindner v. Adams County Bank*, 49 Neb. 735. It is, therefore, the surviving partner who has in such case a right to proceed with the action." In the syllabus we held: "That the surviving partner was already a party to the action, and that on the death of the other partner the action could properly be continued in the name of the survivor alone." The principle is the same, whether the partners are plaintiffs or defendants.

The fact that plaintiff, in the tax foreclosure suit, on the date the decree was entered, saw fit to dismiss his suit as to Job Hathaway, who was then dead, did not deprive the court of jurisdiction to determine all of the questions involved in that suit, for the reason that if Job Hathaway were then dead, as the pleadings in this case show, then Emma C. J. Austin, as the sole surviving partner of Job Hathaway & Company, was vested with

the equitable interest as fully and completely as she and her copartner were prior to his decease. Hence, the status of the *res* had not been changed, and the court could proceed to determine all of the issues precisely as if the formal dismissal of Job Hathaway by plaintiff had not been made. His dismissal, therefore, did not affect the rights of either the plaintiff or cross-petitioner Lanning. In addition to this, we are inclined to think (although as the question has not been argued, we do not so decide) that the dismissal of the suit as to Job Hathaway, by plaintiff, operated only as a dismissal of the suit so far as plaintiff was demanding any relief against him, but did not operate as a dismissal of Job Hathaway as to the relief demanded in the cross-petition of defendant Lanning. Such a dismissal could only be made upon Lanning's motion.

Even if the failure to serve the copartnership by leaving a summons at its usual place of business, with a member thereof, rendered the decree void as to the copartnership as a separate entity, it did not affect the validity of the decree as against the equitable interest of the members of the copartnership who were served. The interest of the copartnership in the land being an equitable interest, held by the firm, first, for the benefit of its creditors, and, second, for the members of the firm, the decree bound the latter, and the sale of the property under such decree foreclosed their individual interests; and the fact, if it be a fact, that the creditors of the copartnership might assail the decree, is immaterial so far as plaintiff here is concerned, for the reason that he, as the grantee of the heirs of Job Hathaway, is bound by such decree. He bases his action upon rights which he alleges he obtained from the heirs of Job Hathaway. The interest of their ancestor having been foreclosed by the decree, they had no interest which they could convey to plaintiff.

Plaintiff's suit is, therefore, without equity, and was properly dismissed.

AFFIRMED.

WILLIAM B. LUCAS ET AL., APPELLANTS, V. ASHLAND LIGHT,
MILL & POWER COMPANY, APPELLEE.

FILED NOVEMBER 27, 1912. No. 16,347.

1. **Statutes: TITLE OF ACT: MILLS.** The title of the act of 1873 (Gen. St. 1873, ch. 44, Comp. St. 1911, ch. 57), "An act relating to mills and milldams," is sufficiently broad to admit of legislation in regard to mills of all kinds that are of public utility and having "machinery to be propelled by water."
2. **Quaere.** Whether the provisions of that act extend to mills such as "saw, carding, or fulling mills," when wholly private in their nature, *quaere*.
3. **Eminent Domain: PUBLIC UTILITIES: QUESTION FOR LEGISLATURE.** Whether an undertaking is for the benefit of the people at large, and should be regarded as of public utility, must necessarily be largely within the discretion of the legislature to determine, and, unless it is clearly private in its nature, the court will not interfere with this legislative discretion.
4. ———: ———: **WATER POWER.** The use of water power to generate electricity to supply a city and its inhabitants with light and power is a public use, and the act should be construed to apply in such case.
5. ———: ———: **CHANGE OF USE.** When the right of flowage of private lands has been acquired under the *ad quod damnum* act for a public purpose, if the use of that right is changed to an entirely different and private purpose, it will amount to an abandonment of the right, but a change from one public use to another, which is within the purview of the act, will not amount to an abandonment of the right.
6. ———: **FLOWAGE: REMEDIES OF LANDOWNERS.** Owners of riparian lands which are injured by flowage, and were not included in the original *ad quod damnum* proceedings, may proceed under section 14 of the act. Gen. St. 1873, ch. 44. After the dam has been built at great expense and the mill has been in operation for many years, they cannot maintain an action in equity to abate the dam as a nuisance, or to restrain the use thereof until their alleged damages are adjusted.
7. ———: ———: ———: **DAMAGES.** In an action in equity by the owners of riparian lands to enjoin the use of the water power and remove the dam as a nuisance, and for general equitable relief, the trial court should adjust the rights of the several parties, and, if the injunction is refused, should allow plaintiffs such damages as they are entitled to.

8. ———: ———: ———. In such action, plaintiffs whose lands were not included in the original *ad quod damnum* proceedings should be allowed such damages as are caused by maintaining the dam; and those whose lands were included in the original proceedings should be allowed such damages, if any, as the new and additional use of the dam and power cause to their lands over and above the damage caused by the dam and the use thereof, as allowed in the original proceedings.

APPEAL from the district court for Saunders county:
GEORGE F. CORCORAN, JUDGE. *Affirmed in part and reversed in part.*

John J. Sullivan and Louis Lightner, for appellants.

Hainer & Smith, G. W. Simpson and H. Gilkeson, contra.

SEDGWICK, J.

In 1873 Oscar M. Carter prosecuted proceedings in *ad quod damnum* in the district court for Saunders county, and in the following year obtained a judgment in that action, establishing his right to erect and maintain a dam across Wahoo creek on certain lands then owned by him near the town of Ashland, in said county. This dam by the judgment was not to be maintained more than 15 feet high above low-water mark, and damages were allowed to the owners of certain riparian lands which it was found would be injured by raising the water to that height. This defendant succeeds to these rights by mesne conveyances. The petition in *ad quod damnum* showed that the "petitioner is erecting a grist mill on his said land, and is constructing a dam across said Wahoo creek, * * * and is excavating a mill-race for his said mill," and prayed "that he might have leave to proceed to the construction of his said improvements." The order of the court recited that the petitioner had asked "for leave to build and continue his milldam at the point described in his said petition." The jury by their verdict found that "by reason of construction and continuance of the milldam built 15 feet high above low-water mark (the defendants, naming

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them, would be damaged in certain amounts specified), and that the said flouring mill erected by the plaintiffs will be of public utility." This verdict was approved by the court, and it was ordered, among other things, that "the plaintiff be and is hereby authorized to build and continue his said mill and milldam as prayed in his said petition." Mr. Carter thereupon built a small mill and erected a dam, and afterwards other dams which appear to have been unsubstantial and of a temporary nature. In 1889 a substantial dam was begun, which was completed in the following year. This dam was built at considerable expense. Many car-loads of rock were used, and this dam has continued in service and has proved to be a substantial and suitable structure. Prior to the erection of this dam, it would seem that the power had been used principally, if not entirely, for grinding grain. In 1890 electrical machinery was installed, and the power was used for furnishing electric lights for the city of Ashland and its inhabitants. In May, 1907, the mill and a large part of the machinery were destroyed by fire, and the owners of the property immediately rebuilt the building and power-house and installed new machinery therein. Since that time the power has been used for generating electricity for the city of Ashland and its inhabitants.

In December, 1907, these plaintiffs began this action in the district court for Saunders county, alleging that they were owners of riparian lands damaged by the maintenance of the defendant's dam, and asking that the dam be "adjudged to be unlawful and a nuisance, and that it be abated and the defendant perpetually enjoined from maintaining it or any other dam on Wahoo creek, whereby said lands or any of them may be flooded," and for general equitable relief.

The plaintiffs also alleged that the dam was being maintained at a greater height than allowed by the *ad quod damnum* proceedings, and asked for an injunction restraining the defendant from so maintaining the dam. A temporary restraining order was issued restraining the de-

defendant from raising or maintaining the dam above the top of the solid masonry thereof by means of flash-boards, or otherwise. The defendant answered, alleging special matters in defense, which will be stated, so far as may be necessary, in the discussion of the questions of law and fact presented in the briefs. Upon the trial the court found generally in favor of the defendant and dismissed the plaintiffs' proceedings. The plaintiffs have appealed.

The plaintiffs insist that the dam is not now being devoted to a public use, and that "an easement for a particular purpose ceases when the purpose no longer exists," and that, "in any event, the dam can only be maintained 15 feet above actual low-water mark;" that the dam has been substantially raised above the prescribed limits by use of "flash-boards," which in effect added something like two feet of height to the dam. It is also insisted that some of the plaintiffs in this case are the owners of riparian lands which were not included in the *ad quod damnum* proceedings, and which are injured by this dam, and that such plaintiffs are entitled to relief, although others are not found to be so. The case is an important one, and some of the difficult questions presented are without precedent in this state. A reargument was allowed, and we have had the assistance of a thorough and able presentation of the case from both points of view.

1. The principal discussion has been in regard to the nature of the rights conferred in *ad quod damnum* proceedings, and in that connection, also, in regard to the limitations placed upon the legislature by the constitution. The constitution has placed certain limitations upon each of the three departments of government. Whether an attempted act of legislation is beyond its power is a question of law. The constitution makes it the duty of this court to determine questions of law that arise in litigation before it, and, when an act of the legislature is drawn in question as beyond its power, we cannot avoid the determination of the question so presented.

The courts have, no doubt, in some instances interfered

unjustifiably with legislation. This power should be carefully guarded and judiciously used, avoiding any tendency to restrict legislation to the limits that the judges think are beneficial and desirable. This, of course, the courts have no power to do. In all questions of doubt, the legislature should determine the matter. When there is substantial and reasonable doubt, the act of the legislature must be upheld. Two objections are urged against the constitutionality of the act. The first is that the title of the act is not broad enough to admit of legislation concerning "machinery to be propelled by water," and that, therefore, that clause in the first section of the act has no force. The title of the act is "An act relating to mills and mill-dams." Gen. St. 1873, ch. 44. If we consider the word "mill" in its original and first meaning, there is no doubt that it would not include "machinery to be propelled by water," unless that machinery was to be used in grinding; the word "mill" originally meaning to grind or make fine. This word has, however, been used for many years and has now acquired a variety of uses. Webster's Unabridged Dictionary, after defining the word "mill," uses this language: "In modern uses the term mill includes various other machines or combinations of machinery * * * to some of which the term manufactory or factory is also applied." And in the New International Directory this statement is changed, and the fifth definition of the word "mill" is: "A building or collection of buildings with machinery by which the processes of manufacturing are carried on." The Standard Dictionary gives, among others, the following definitions: "(2) Any one of various kinds of machines that transform raw material by other processes than grinding into some other form; as, a saw-mill; planing-mill. * * * (5) An establishment for reducing ores by a process other than smelting. An iron-works where the metal in the cruder forms is converted into merchant iron. (6) A building fitted up with the machinery requisite for a factory; as, a cotton-mill; woolen-mill. * * * (10) (Slang.) A pugilistic com-

bat; set-to." And it is stated that "mills are named from their action on the substance operated upon, and from the material or substance that they operate upon or prepare for use"—citing between 40 and 50 kinds of mills.

In Colorado their constitution provides that private property may be taken for private use without the consent of the owner "for private ways of necessity, and * * * for reservoirs, drains, flumes or ditches, on or across the lands of others, for agriculture, mining, milling, domestic, or sanitary purposes," and the supreme court of that state held that, under this provision of the constitution, land could be condemned to carry water to operate an electric light plant. The court held: "The term 'milling,' as used in the constitution, is synonymous with the word 'manufacturing,' and an electric light plant is a manufacturing establishment." *Lamborn v. Bell*, 32 Pac. 989 (18 Colo. 346). Our constitutional provision, that the subject of legislation must be expressed in the title of the act, is supposed to be to prevent inserting foreign matters in pending bills, and so securing ill-considered legislation. "An act relating to mills and milldams" is a comprehensive title. It permits of legislation regarding any kind of mill that uses "machinery to be propelled by water." We think this objection cannot be sustained.

The second constitutional objection which the plaintiffs urge against the construction of the statute contended for by the defendant is that the legislature has no power to condemn private property for private use. The *ad quod damnum* act involves the exercise of the right of eminent domain, and it is contended that to generate electricity to be furnished to a city and its inhabitants is not a public use, and beyond the power of the legislature to authorize the damaging of private property for such purpose, and therefore to make such use of the right obtained by *ad quod damnum* is to abandon the right which was originally given and was within the power of the legislature. The Massachusetts court, construing the statutes of that state, appear to have held that the provisions of the milldam act

extend to mills for mechanical and manufacturing purposes as well as to those intended to serve the public for a stipulated toll, and this appears not to violate the fourteenth amendment of the federal constitution. *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140. We do not find it necessary to determine or discuss this question.

Is the use that is being made of this power a public use? There is an interesting discussion of this question in 3 Farnham, Waters and Water Rights. The author severely criticises the decisions of several courts, and especially the supreme court of Massachusetts. He does not agree with that court in upholding the constitutionality of acts which allow the flowage of lands for the purpose of constructing private mills, and says: "The only things that will justify such a taking is the intention to use the power for the direct benefit of the public, as by the erection and operation of a public mill, where every one will have a right to have his work done upon payment of a toll, and which will always be under control of the legislature." Section 697. In discussing the question how far a water power can be taken under the power of eminent domain for the purpose of generating electricity, this author says: "If the electricity generated is to be subject to the common use of all who apply for it upon making reasonable compensation, it is more nearly a public use than is any other connected with the generation of power." Section 697b. The supreme court of Minnesota has decided that "the generation of electricity by water power for distribution and sale to the general public on equal terms, subject to governmental control, is a public enterprise, and property so used is devoted to public use." *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 5 L. R. A. n. s. 638. It was said by the supreme court of Vermont, in *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109: "But to say what a public use is with sufficient comprehensiveness and accuracy to meet the exigencies of all cases is, to say the least, difficult. Nor is it easier to define the limit of legislative power in respect to the right of eminent domain. This power

must have some degree of elasticity, that it may be exercised to meet the demands of new conditions and improvements, and the ever varying and constantly increasing necessities of an advancing civilization. The circumstances and requirements of the particular case, and the practice of other states and governments where constitutional limitation is placed on legislative action in this respect must be our guides in determining what is and what is not a public use. It is sometimes easier to say what is not than to say what is." In *Traver v. Merrick County*, 14 Neb. 327, this court quoted from the Massachusetts statute and the decisions of that court, apparently with approval, and it was held that bonds given in aid of a water mill were valid. It appears from the syllabus in the case, and perhaps from some of the expressions in the opinion, that the mill in question was a public mill, intended to grind for toll, but this is not treated in the opinion as necessarily a controlling matter. The case has been cited by text-writers as following the Massachusetts rule. 15 Cyc. 598. In the later case of *Getchell v. Benton*, 30 Neb. 870, it is held that a beet sugar manufactory, which does not manufacture sugar from beets for toll, although propelled by water power, is not within legislative control by virtue of any law of this state, and is not a work of internal improvement. The opinion seems to put this holding upon the ground that it is not a work of public utility. Whether an undertaking is for the benefit of the people at large, and is so general in its nature that it should be regarded as a public utility, must necessarily be within the discretion of the legislature to determine, and, unless it is clearly private in its nature, the courts will not interfere with this legislative discretion. Under such circumstances, it becomes a question of ascertaining the intention of the law-makers.

The evidence shows that this defendant is using this power to furnish the city of Ashland and its inhabitants with electricity for lighting and power purposes. It was organized for that purpose. The law requires it to furnish

all applicants upon equal terms. Its business, including its rates, are subject to legislative regulation. This would seem to be a public use.

2. It is contended that the statute cannot be construed to authorize this use of the right obtained by *ad quod damnum* proceedings. The language of the first section of the act is a sufficient answer to this objection. "If any person, desiring to erect a dam across any water-course for the purpose of building a water grist, saw, carding, or fulling mill, or of erecting any machinery to be propelled by water, * * * he may file a petition," etc. Comp. St. 1911, ch. 57, sec. 1. The last legislature enacted a statute providing that cities and villages can acquire milldam sites for municipal purposes. Laws 1911, ch. 83. This is a legislative construction that such use of the power is a public use, and clearly contemplates that rights of flowage acquired by *ad quod damnum* proceedings may be used for such purposes. Unless this is true, the act in its most common application would be unconstitutional.

3. It is said that "an easement for a particular purpose ceases when the purpose no longer exists," and *Gross v. Jones*, 85 Neb. 77, is cited as supporting this proposition. In that case the principal question determined was whether the dam and the power generated thereby had been abandoned. It is assumed in the opinion that to maintain the dam and mill-pond for the purpose of furnishing ice would not be such a use of the right acquired as to prevent the loss of the right by abandonment for nonuser. It may be conceded that, having obtained the right of flowage of these lands for a specified public purpose, it cannot be devoted to an entirely different and private purpose, and an attempt to do so would be an abandonment of the right obtained. The question is: What must be regarded as a different purpose within the meaning of this rule? In *Chicago & E. I. R. Co. v. Clapp*, 66 N. E. 223 (201 Ill. 418), the supreme court of that state held: "Where a railroad company has ceased to operate a branch to a coal mine after the mine was exhausted, had taken up the tracks

and nearly all the ties, removed all the crossing signs and all the cattle guards but two or three, taken out the switch ties and bridge timbers, allowed the right of way to grow up with weeds, and failed to keep the fences in repair, it was proper to submit to the jury whether there was an intention on its part to abandon the branch." And the court in the opinion stated the law as follows: "When a corporation, in the exercise of the right of eminent domain, acquires for a public purpose a mere easement in land, its right and title to the property so acquired are dependent upon the use of the property for public purposes, and when such public use becomes impossible, or is abandoned, its right to hold the land ceases, and the property reverts to its original owner." There must be necessarily some substantial basis upon which to determine the character of the purpose for which the right is used. The right obtained in this case was to raise the dam to a given height for milling purposes. A change from the exclusive grinding of wheat into flour to the grinding of corn, barley, and other grains might be in some sense applying the power to a different purpose, but clearly not within the meaning of the limitation that we are considering. One who objected to such a change of the purpose to which the power was applied should suggest some substantial basis for such a distinction. *Hathaway v. Mitchell*, 34 Mich. 164. See, also, note, 67 L. R. A. 390. We have seen that the legislature has in the most solemn form authorized the application of rights so acquired to municipal purposes. The change is from one public use to another, and not a change from a public to a private use. The present use of the power is not such a change from that authorized by the *ad quod damnum* proceedings as to amount to an abandonment and justify the destruction of the property. The owners of property included in the *ad quod damnum* proceedings should be allowed to recover from defendant all damages which their property has sustained by the new use of the water power, if any, over and above the damages caused by the use authorized by the *ad quod damnum* proceedings.

4. It is urged that some of these plaintiffs were not parties to the *ad quod damnum* proceedings, and their lands which are injuriously affected by the flowage were not included in those proceedings, and that the trial court therefore erred in not granting such plaintiffs any relief. The fourteenth section of the act authorizes any one whose land is overflowed or injured by the maintenance of a milldam to begin proceedings under the act. Perhaps the court intended to indicate in *Kyner v. Upstill*, 29 Neb. 768, that he might maintain an action for damages. This would seem to be in harmony with the holdings in *Chicago, B. & Q. R. Co. v. Englehart*, 57 Neb. 444, *Blakeley v. Chicago, K. & N. R. Co.*, 25 Neb. 207, and *Bronson v. Albion Telephone Co.*, 67 Neb. 111. He could not maintain an action to enjoin the use of the dam, and abate the same as a nuisance, after so long acquiescence under the circumstances in this case. If lands not included in the *ad quod damnum* proceedings are damaged by defendant's dam and the use thereof, the owners of such land should be allowed to recover such damages.

5. The plaintiffs contend that the evidence establishes that the defendant's dam is more than 15 feet above low-water mark, and that the use of flash-boards raises the water to a greater height than is permitted by the rights obtained by the defendant's grantors. They do not attempt any analysis of the evidence, but they allege that the defendant's recital of the evidence upon these points is incomplete and unfair. A large number of witnesses were examined, and the bill of exceptions is quite bulky, presenting some conflict in the testimony. It does not seem advisable to enter upon a discussion of this evidence. It seems to support the conclusions reached by the trial court. The contention of the defendant that the plaintiffs and all parties interested have consented to the use of these flash-boards, and so are now estopped to complain, does not seem to be quite consistent with the position that the defendant has taken in urging that the use of these flash-boards has not raised the water above the prescribed limit.

The defendant does not seem to be in a position to insist upon any greater rights than those acquired through the *ad quod damnum* proceedings. The judgment in this case is without prejudice to a future action, if it should be found that the defendant is exceeding those rights.

The writer would have affirmed the judgment of the trial court as rendered, but upon consultation we concluded that the trial court, having jurisdiction of the matter, should have retained the action for all purposes, and should have allowed the plaintiffs whose lands were not included in the *ad quod damnum* proceedings to recover their damages, and the plaintiffs whose lands were included in the *ad quod damnum* proceedings to recover such damages, if any, to the lands as were caused by the new and additional use of the dam and water power.

The judgment of the district court dissolving the injunction is affirmed, and the judgment is in other respects modified, and the cause remanded to the district court, with instructions to allow the parties to amend their pleadings, if so advised, and take further evidence, if necessary, and determine the plaintiffs' damages as indicated in this opinion.

JUDGMENT ACCORDINGLY.

REESE, C. J., not sitting.

LETTON, J.

I concur in the opinion, subject to the principles of law announced in *Znamanacek v. Jelinek*, 69 Neb. 110, and *Arterburn v. Beard*, 86 Neb. 733.

HAMER, J., concurring.

I agree in the conclusion reached by Judge SEDGWICK that the dam should not be destroyed, but I only partly agree to the things said in the main opinion, and I wish to give my understanding of what I conceive to be the principle which should be applied.

Flour may be manufactured by an aggregation of capital applied to the development of water power and ma-

chinery. A private person may not manufacture flour for his own use because of lack of capital and lack of machinery. The manufacture of flour by private persons or corporations for commercial purposes would seem to be a private use for a public purpose. When each person who comes to mill pays for his grinding by a toll taken from the grist the mill is then a grist-mill. This was the old method. It has been in a very large degree, perhaps entirely, superseded by the method of barter and exchange: that is, the man who comes to mill brings a load of wheat and takes away a certain amount of flour which he receives in exchange for the wheat. This would seem to be the method in vogue at the present time. We have outgrown the ways of our grandfathers, and, according to the standard which existed in earlier times, the flouring mill of today is a commercial enterprise for a commercial use in which the public is interested because the public demands that the flour shall be manufactured and placed upon the market where it may be purchased for the general use of the people, as nearly everybody uses flour.

The thing that justifies the taking of the land and submerging it by water is the creation of a water power to be used in the interest of the public in the conduct of an enterprise to manufacture flour. The mill is for the benefit of the public, and it matters not if the old method of taking tolls out of the grists has been superseded by the new method of exchanging so many bushels of wheat for so many sacks of flour. When the wheat is exchanged for the flour, that is a matter in which the public is interested, although the actual grinding of the flour is a private enterprise conducted by the miller. It is a public utility because it is a necessity to the public, and the creation and maintenance of the power which creates the flour in order that the public may purchase it is clearly a public utility. The actual manufacturing of the flour is a private enterprise, although the flour when manufactured is for the public use. Is there any serious distinction between the manufacture of flour for the use of the public and the

generation of electricity for the use of the public? Do we deceive ourselves with words when we call the manufacture of flour for the public a private enterprise because it is conducted by private capital? And is the generation of electricity by private capital for public use forbidden because the capital used in developing electricity is private capital? Is it the way the thing is manufactured that determines whether it is for the public use and whether the business is a public utility, or is it the necessity of the thing that is manufactured for the public? May it not be said that, because the public demand the use of the flour and also demand the use of electricity, the manufacture of the flour and the generation of the electricity are both public utilities. In Massachusetts all sorts of mills are treated as public utilities. The rule adopted in Massachusetts consults the welfare and benefit of the public. The mill-streams are there lined with cotton factories, woolen factories, and shoe factories, and, while these enterprises are conducted by private capital, the right to dam up the streams and to utilize the power in these various manufactories is for the betterment of the whole people. These occupations give employment to thousands of people. They permit the investment of millions of dollars. These enterprises are held to be public utilities because of the great public interest in them and because of the great public benefit received by the people.

Section 13 of the Bill of Rights of the constitution of 1866: "The property of no person shall be taken for public use without just compensation therefor." The foregoing declaration of rights was in force when the property in question was taken. The constitution itself does not specify a particular use, as the manufacture of flour alone or corn-meal or feed or lumber, but it is just the taking of the property for "public use." The provision of the constitution of 1866 was followed by section 21 of the Bill of Rights in the constitution of 1875, and that section contemplates the taking or damaging of property for "public use," and it does not provide that after the prop-

erty is taken for public use it shall be used for any special purpose. Chapter 57, Comp. St. 1911, contains the original section as it is now amended. This section contemplates erecting "a dam across any water-course for the purpose of building a water grist, saw, carding, or fulling mill, or of erecting any machinery to be propelled by water." Section 1. The section appears to have been intended to cover the things known when the act was passed, and then, seemingly as an afterthought, there is added "erecting any machinery to be propelled by water." I am unable to conceive of language broader than that employed in the section, and there is seemingly nothing in the constitutions of 1866 and 1875 to forbid the use of the language employed. It is apparent from this language that the makers of the constitution intended to compel the payment to the private owner of the amount of his damages before the property could be taken for public use. As that has been done once and the property has actually been taken for public use, is there any reason why there should be a second payment when the private owner has been paid once for the taking of his property? Is not that enough? To meet the new conditions of advancing civilization, should the courts say that the narrowest possible construction should be put upon the language used, and that the legislature intended that the power once acquired could only be used for the least number of purposes to which it might be applied? Is it not better that the courts should be liberal in the construction of statutes like this? Is it not better that there should be a degree of elasticity in limiting the legislative power in respect to the right of eminent domain? Section 15, ch. 57, Comp. St. 1911, contemplates the bringing of a petition to obtain leave to build a mill or milldam. By this language it would seem that the legislature intended that there might be either a mill or milldam, or both. Milldam would seem to be a general term by the construction of which power is obtained and not necessarily to run any particular kind of mill. Section 24 of the same act seems to contemplate a

"milldam belonging to any mill or machinery." It authorizes the owner of the mill to enter upon lands contiguous for the purpose of repairing embankments to prevent the water from breaking through in case of flood. Section 27 of the same act makes those mills which grind for toll public mills. Section 33 of the same chapter provides for changing a public mill into a private mill. This may be done by posting a notice on the mill and in two other conspicuous places within the county, and by reimbursing those people who have assisted in the erection of the public mill. It is not, however, contemplated that because the mill becomes a private mill the milldam shall be abandoned or destroyed.

It will be seen by this that the legislature did not contemplate the exclusive application of the power to a mill grinding for toll. Putting it the other way, the legislature contemplated the *ad quod damnum* proceedings and the payment of damages and the use of the power obtained for the running of a private mill. It is undoubtedly a public utility to build a dam and a mill for the manufacture of flour. To build such a mill and to manufacture flour is a private enterprise conducted with a public purpose. It may be a private enterprise to generate electricity for the use of the public with which the public may light its streets and buildings. Is the use of the power to manufacture flour more a private enterprise than the use of the power to generate electricity? By virtue of the *ad quod damnum* proceedings, the plaintiffs in this case sold to the original proprietors the right to flow their lands. Their lands were originally overflowed for the purpose of furnishing power to run the mill. The thing that the plaintiffs parted with was the right of the petitioner in the *ad quod damnum* proceedings to overflow their lands along the creek in consideration of the money which he paid to them for that privilege. They have been paid once. Can it be of any serious moment to them whether their lands are overflowed for the purpose of furnishing power to a mill that grinds flour which the public purchase and

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use, or a mill or machinery that provides something else which the public need and purchase and use? The people who own these lands agreed that their lands might be submerged, and they were submerged. They are only submerged yet.

It is contended, with ingenuity and force, that only the things can be done which were in contemplation of the original jury that sat in the *ad quod damnum* proceedings. The theory is that there can be no growth or change. The theory is that it must be a "grist-mill," and that it cannot be anything else. It would hardly seem that this contention is fair in view of the provisions of the constitution and in view of the provisions of the statute. The words used, "erecting any machinery to be propelled by water," certainly suggest that it was in contemplation of the legislature that something else might be done in addition to running a flour-mill. If this be not so, then is there any purpose in using the words "erecting any machinery to be propelled by water"? If the right was granted for the purpose of using power, what difference can it make to the grantors whether the power is applied to one purpose or another? They have consented that the water may be backed up the stream, and that their lands may be submerged so that the power may be created. What difference can it make to them whether the power is applied to one legitimate purpose or another? They have recognized the principle that the power may be created and applied. When the power is created and has been applied, why should they seek to destroy it?

In view of the able opinion delivered by Judge SEDGWICK, I hesitate to write anything in addition, and I only do so because of the fact that the main opinion does not seem to me to fully give the reasons which I believe should be given to justify the conclusion reached.

ROSE, J., dissenting.

As I see the merits of this case, the affirmance of that part of the lower court's decree denying an injunction to

prevent defendant from overflowing the lands of plaintiffs deprives them of constitutional rights and leaves portions of their real estate in control of a trespasser. Entertaining this view, I am compelled to dissent. In giving the reasons by which I am guided, I prefer to state in my own way what I find in the record and the questions presented for determination.

The relief sought by plaintiffs is a perpetual injunction to prevent the maintaining of a dam across Wahoo creek near Ashland. They are upper riparian proprietors whose lands are damaged by overflowing water. Defendant is a corporation. It maintains the dam and uses the water-power of the stream to generate electricity for lighting purposes in the city of Ashland, Nebraska, and in Pacific Junction, Iowa. The trial court dismissed the case after a trial on the merits, and plaintiffs appealed to this court for the equitable relief denied below.

One of the grounds urged by plaintiffs for an injunction may be stated in this form: Defendant never had any right to maintain the dam except for the purpose of operating a grist-mill; that right has been lost by abandonment or nonuser, and defendant is unlawfully overflowing the lands of plaintiffs for the purpose of running an electric light plant. On the other hand, defendant, through an easement of flowage acquired by condemnation, asserts the right to use the water-power to propel the machinery installed in its power-house. In determining the merits of these contentions, the privilege under which defendant assumes to act must be traced to its source. By a judgment rendered May 26, 1874, in *ad quod damnum* proceedings in the district court for Saunders county, Oscar M. Carter was authorized to construct and maintain a dam on the present site, and he promptly exercised the right thus granted. It is stipulated by the parties that defendant, through mesne conveyances, succeeded to the rights of Carter. On the face of his petition in the condemnation proceeding, the enterprise originally undertaken, in addition to the construction and maintenance of the dam, was

the operation of a "grist-mill." In performing their duties the jury, selected under the writ of *ad quod damnum*, among other things, found: "Said 'flouring-mill' erected by the plaintiff will be of public utility." And it was adjudged by the court: "That the plaintiff be and is hereby authorized to build and continue his said mill and mill-dam as prayed in his said petition." On the right thus acquired defendant attempted to justify the overflowing of plaintiffs' lands to generate electricity for lighting purposes alone. Is that position tenable? A finding by a jury that the mill will be of public utility is by statute made an essential part of the proceeding to condemn lands under the act of 1873. The finding of the jury was limited to the public utility of a flouring-mill, and the decree of the court in the *ad quod damnum* proceeding went no further. Is defendant now lawfully exercising the original easement of flowage? Since 1896 no flour has been manufactured, and one of defendant's officers admitted on the witness stand that the establishment could not during that period be considered a "flouring-mill." The original building was old and dilapidated in 1904. During the fall of that year and the ensuing year it was torn down and the flouring machinery removed. The old structure was replaced by a power-house in which electrical machinery for a lighting plant was installed. The flouring machinery was nearly all sold and there was no attempt to replace it. A corn-burr, however, was retained, and there is convincing proof that defendant intended to use it for the purpose of preserving the original easement of flowage, instead of operating a grist-mill in good faith. The remaining operations of the grist-mill, so far as disclosed, consisted of grinding a sack of grain for one customer, five or ten bushels for another, and a car-load for the owner of the mill. The plant was destroyed by fire May 8, 1907, and since that date no grain of any kind has been ground, nor has defendant installed any machinery for that purpose. The electric power-house, however, was promptly restored and equipped for the utiliza-

tion of both steam and water-power. The truth of the record is that electric lighting is the soul of defendant's enterprise. To that business it has devoted its capital and energy. Neglect, nonuser and abandonment of the milling enterprise, for which alone the right of flowage was established, are shown with equal certainty. It abandoned its grist-mill and lost the incidental easement of flowage.

It is settled law in this state that the condemnation did not vest in Carter or in his grantee the right of flowage in perpetuity. What he procured was the mere privilege of exercising his easement during its existence. *Gross v. Jones*, 85 Neb. 77. The original easement of flowage for grist-mill purposes, therefore, cannot be successfully interposed as a defense to the action of plaintiffs to enjoin defendant from overflowing their lands for the sole purpose of utilizing the water-power for an electric light plant. After abandonment of the particular use for which a mere easement in land is established, it cannot be lawfully devoted to a different purpose without payment of additional compensation or recondemnation. *Heard v. City of Brooklyn*, 60 N. Y. 242; *Campbell v. City of Kansas*, 102 Mo. 326; *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. St. 23. Having lost the original easement by abandonment and nonuser, having made no effort to condemn the lands of plaintiffs for the new and different purpose of obtaining water-power to generate electricity, and having failed to pay for, or otherwise acquire, an additional right of servitude, defendant is a trespasser, and should be enjoined as such.

The deduction I make from the facts and the law cannot be avoided by merely pointing to the milldam act of 1873 and asserting that its title is broad enough to include legislation relating to the procuring of easements of flowage for the purpose of generating electricity by water-power, that the purpose named is a public one, and that the act authorizes such easements. If the title is as broad as the description of the majority, and if the act contains

provisions for the condemnation of land for an easement of flowage for the purpose of generating electricity by water-power, defendant is still a trespasser for the following reasons: It abandoned the mill and lost its incidental right of flowage. It did not in a new *ad quod damnum* proceeding under the act of 1873, or in any other manner, acquire the right to use plaintiffs' lands for electric lighting purposes. It did not pay for such different and additional use. No jury ever found, as required by the milldam act, that the new enterprise is a public utility. No court ever so held in an *ad quod damnum* proceeding. The original judgment rendered in 1874 did not extend to the new enterprise. Damages therefor were never estimated or paid. The lighting of cities by electricity was unknown in 1873, when the milldam act was passed. An easement of flowage to supply an electrical plant with power was not at that time in the mind of the legislature, or of the jury, or of the court, or of the parties. In the *ad quod damnum* proceeding, therefore, Carter acquired no electric lighting easement. The method of appropriating private property for a public purpose is defined by statute. There is no pretense that defendant pursued the statutory method after it lost its original easement. If defendant had a right under the act of 1873 to acquire a new easement applicable to the new use, without the consent of plaintiffs, that right has never been exercised. Since defendant never acquired an electric-lighting easement under the milldam act, I decline to express an opinion on the breadth of its title or on the scope of its provisions.

I do not find in the record any substantial proof of the acquiescence suggested by the majority as a reason for denying equitable relief. The power-house and other improvements were constructed on land to which defendant owned the fee. The power-plant is equipped to utilize both water-power and steam-power. By the latter the lighting enterprise can be carried on without the right of flowage. Improvements for utilizing steam-power did not concern

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plaintiffs. As long as the grist-mill was operated in good faith, plaintiffs were not injured by the maintenance of the dam at the lawful height. Defendant at all times claimed the right to maintain the dam under the original easement. It now asserts that right in this court. It kept a corn-burr for the ostensible purpose of exercising its grist-mill easement, while its real business was electric lighting. Under the circumstances of this case, plaintiffs should not be deprived of their property because they did not discover, at an earlier date, contrary to the continuous assertions of defendant, that the grist-mill had been abandoned. If I apprehend the import of the majority opinion, cases are cited to sustain the proposition that a chancellor should not inconvenience the public or interfere with a public utility by granting an injunction which would interrupt public service. It may be conceded that a landowner who knowingly permits a railroad company to build and operate a highway on his land, or a telephone or telegraph company to proceed under like circumstances, is sometimes limited to the remedy for damages. That rule, however, has no application here. Defendant's power-house is equipped to utilize as much steam-power as water-power. The granting of an injunction would not interfere with the public service, but would permit plaintiffs to control their own property until such a time as defendant acquires by lawful means the easement it now exercises in violation of law.

FAWCETT, J., concurs in the dissenting opinion.

IDA BRADFORD, ADMINISTRATRIX, APPELLANT, V. BEE BUILDING COMPANY, APPELLEE.

FILED NOVEMBER 27, 1912. No. 16,822.

Master and Servant: ASSUMPTION OF RISK. It is the duty of the employer to furnish a reasonably safe place for his employee to work, but if a machine which is a necessary part of the equip-

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ment is unsafe, because not sufficiently protected to prevent contact with it, and the employee has full knowledge of its condition and takes charge thereof with the other machinery, without objection, and is injured by coming in contact with the exposed machine, he will be held to have assumed the risk of such injury.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

W. W. Slabaugh, for appellant.

Greene, Breckenridge, Gurley & Woodrough, contra.

SEDGWICK, J.

In the basement of the Bee building in Omaha there is complicated machinery, including dynamos, commutators and generators for furnishing power to printing presses and other machinery in the building, and for furnishing light to the various other occupants of the building. For ventilating the basement there was placed therein a fan, described by the parties as a large section fan with arms like a boat propeller, which ran about one-half inch from the two cross-bars, one perpendicular and the other horizontal, into which, at their junction, the pivot of the fan revolved. There was no screen or guard or protection over the fan, except these two bars crossing before it at right angles to each other. Bradford was an employee of the defendant company in the capacity of an electrical engineer. While in that employment he passed in front of this fan, and alleged that his hand was brought into the fan and injured. He brought this action in the district court for Douglas county to recover the damages sustained. Upon the close of the plaintiff's evidence, the defendant moved the court for an instruction to find in its favor. The court instructed the jury to find a verdict in favor of the defendant, and the plaintiff has appealed.

The fan revolved rapidly, and had great power, to remove the air from the basement and force it out of the building. The first contention is that the defendant was

negligent in not further protecting the fan; that the fan was a dangerous instrument, and should have been covered with a screen or otherwise so protected as to prevent the employees of the defendant from coming into contact with it. It is, of course, the duty of an employer to furnish his employees with a safe place in which to work, and there appears to be sufficient evidence in this record from which the jury might have found that the defendant had failed in this respect. The duty of the employer to furnish a safe place for his employees to work is an important one. He has the control of such matters, and is in a position to know whether his building and machinery are properly constructed and guarded. If we conclude that this fan should have been covered, and that the defendant was negligent in that regard, we still have the questions of assumption of risk and contributory negligence to determine. These questions have been before the courts everywhere very often, and this court has frequently considered them. Some propositions governing their applications in actions for personal injuries have been so firmly settled in the earlier decisions that the courts are not now at liberty to overturn them. If the law, as it has long been established in this state, is unjust to the employee, it devolves upon the people through the legislature to correct it. Under the law, as it now is, even if a machine or instrument is imperfect and dangerous, an employee who without objection, uses it with full knowledge of its condition assumes the risk of injury in its use. And, when the employer is guilty of negligence causing injury to the employee, he is not liable in damages if the employee is also guilty of negligence directly contributing to the injury.

Applying the so long-established principles of law the plaintiff's case must fail. Mr. Bradford was an electrical engineer of 20 or more years' experience. It was because of this experience that he was entrusted with the management of this complicated machinery. Mr. Parker was his superior; but, when Mr. Parker was away, Mr. Bradford was in full charge and control of the room and machinery.

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This was generally the case in the evening and fore part of the night, and Mr. Bradford was alone in charge when the accident happened. At such times this fan ran for his benefit, if it ran at all. He was not accustomed to keep it running when he was alone in the evening. Generally, Mr. Parker turned it off when he left the building in the afternoon. When he failed to do so, Mr. Bradford turned it off himself. He says that on this occasion he did not know it was running; but it was his duty to know and to determine for himself whether it should continue to run. He discovered that something was wrong in the electric machinery, and had been directed to attend to such matters at once, and instructed that great danger to the machinery and building might result almost instantly if the generators or other electrical machinery became out of order. There was a narrow passageway in front of this fan, which he says was some eight feet shorter way to the machinery, where he had observed trouble, than the passageway usually used. In his haste to remedy the fault in the machinery, he took the shorter way, which was dangerous, and while passing the fan his hand was drawn into it by the air. If he was not himself negligent in carrying his hand so close to the fan, the danger was certainly easily avoidable. He knew all of the existing conditions. The apprehended danger to the electrical machinery was not so imminent as to justify risking human life or limb to remedy it, and yet he rushed by the fan and placed his hand where it was injured thereby. The fan was a part of the permanent equipment of the building. He undertook to manage it with the rest of the apparatus, and made no objection on account of any supposed dangerous condition. Either he allowed himself unnecessarily to become so unreasonably excited as to fail to use his senses, or else he deliberately assumed the risk of accident. In either case, under the long-established law of this state, he cannot hold his employer liable for the consequences.

This action now appears in the name of the administratrix of his estate. It is said that since the trial below Mr.

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Bradford has died. The defendant questions this statement, and raises questions as to the regularity of the appeal to this court. We have preferred to dispose of the case upon its merits. The evidence was not sufficient to support a verdict for plaintiff, and the court was right in directing a verdict for defendant.

AFFIRMED.

VALPARAISO STATE BANK, APPELLANT, v. CHRISTIAN J. SCHWARTZ ET AL., APPELLEES.

FILED NOVEMBER 27, 1912. No. 16,848.

1. **Creditors' Suit: PERSONAL CONTRACTS.** The contract of husband and wife to support his father in their family and furnish him with \$50 a year during his life is a personal contract, and the rights of the father under the contract cannot be subjected by a court of equity to the payment of a judgment against him.
2. ———: **HOMESTEAD.** In such case, if the consideration for the contract on the part of the father was the conveyance of his homestead of the value of \$3,000, which is exchanged for a home for the husband and wife upon which the father retains a lien to secure the performance of the contract, the father's interest in the property so conveyed to the husband and wife will not be subjected to the payment of a judgment upon an indebtedness incurred after the transfer of the property to the husband and wife.
3. **Homestead: TENANCY IN COMMON.** The homestead of a family may be taken in property of either the husband or wife, and if their home is owned by them equally as tenants in common, and is of the value of the homestead exemption, neither can claim other real estate exempt.
4. **Fraudulent Conveyances: HOMESTEAD.** If the husband and wife own two town lots equally as tenants in common, and reside on one of them as their home, which is of the full value of the homestead exemption, the undivided one-half interest of the husband in the other lot will not be exempt from a judgment against him. The transfer by him of such interest to his wife without consideration, to hinder or delay his creditors, will be set aside as fraudulent.

APPEAL from the district court for Saunders county:
BENJAMIN F. GOOD, JUDGE. *Reversed.*

E. J. Clements, for appellant.

G. W. Simpson and G. H. Simpson, contra.

SEDGWICK, J.

In August, 1909, the plaintiff recovered a judgment against the defendants, Jacob Schwartz and Christian J. Schwartz, in the county court of Saunders county, and caused a transcript of the judgment to be duly filed in the office of the clerk of the district court for said county. Execution was issued thereon and returned wholly unsatisfied, and this action was brought in the district court for Saunders county in the nature of a creditor's bill to subject the interests of the defendants in certain property to the payment of the judgment. The district court found in favor of the defendants and dismissed the case, and the plaintiff has appealed.

In January, 1907, the defendant Jacob Schwartz, who was a widower, owned 80 acres of land in Seward county, which was his homestead, and which he had occupied as such for many years. He then conveyed this land to one Scott, who was the owner of lots 14 and 15 in block 3, in the village of Valparaiso, in Saunders county, and Scott conveyed the two lots to the defendants Christian J. Schwartz and Betty Schwartz, his wife, who took the lots as tenants in common. Christian J. Schwartz is the son of the defendant Jacob Schwartz. The consideration paid for these lots conveyed to Christian and Betty Schwartz was \$4,500. Christian and Betty Schwartz both testified that the homestead of Jacob Schwartz was exchanged for the lots and the lots given to them for supporting Jacob Schwartz during life. There was a mortgage of \$1,000 on the farm, and its actual value above the mortgage was \$3,000. Christian and Betty Schwartz paid the remaining \$1,500 for the lots. At the same time, and as a part of the same transaction, Christian Schwartz and Betty Schwartz entered into a contract with Jacob Schwartz in which they

agreed to "board, clothe, and furnish him with one room," and to pay him \$50 in cash each year during his natural life. This written contract gave Jacob Schwartz a lien upon the two lots as security for the performance thereof on the part of Christian and Betty Schwartz. The parties then made their home in the building upon one of these lots, in which there was also a restaurant kept by Christian and Betty Schwartz. The value of this lot and building is variously estimated by the witnesses from \$1,500 to \$2,500. From a consideration of this evidence we think the value should be found to be \$2,000. The building on the other lot was rented for a barber shop and other purposes. After incurring the indebtedness upon which the said judgment was rendered, Christian Schwartz conveyed to his wife, Betty Schwartz, his undivided one-half interest in the said lots. This conveyance is conceded to have been without consideration.

Plaintiff contends that the interest of Jacob Schwartz in the lots in question under the said contract should be subjected to the payment of the judgment against him, and that the one-half interest in the lot not occupied as a home, which was conveyed by Christian Schwartz to his wife, should also be subjected to the payment of the judgment against him. It is insisted that, as the parties have always resided together in the building upon the one lot, and as Christian Schwartz is the head of the family, the defendant Jacob Schwartz has no homestead interest in the property in which he resides, and that his interest therein is therefore not exempt.

1. The arrangement between Jacob Schwartz and his son and daughter-in-law is peculiarly a personal arrangement. Jacob Schwartz himself could not transfer his rights under this contract to a stranger and clothe that stranger with the power to demand these services and a fulfilment of this contract on the part of Christian Schwartz and his wife. Under such circumstances, a court of equity will not attempt to appropriate the interests of Jacob Schwartz under this contract for the benefit

of his creditors. Ordinarily an order to that effect could not be enforced. There are considerations arising out of the relationship of the parties and their mutual undertakings for the benefit of each other that are wholly personal and are incompatible with the substitution of a stranger in the place of either party. See *Hilton v. Crooker*, 30 Neb. 707; *Zetterlund v. Texas Land & Cattle Co.*, 55 Neb. 355, and cases there cited. It is suggested that these reasons do not apply to the money consideration of \$50 a year, but the contract is entire, and the consideration going to Jacob Schwartz under it cannot be separated. The inducement to take one's father into a family and make him a member thereof, conferring and receiving reciprocal advantage from the relation, may be and perhaps generally is much more than \$50 a year. It cannot be supposed that the same contract would have been made with a stranger, or that the \$50 a year for expenses any more than measures the difference between taking one's own father into the family and performing the same services for a stranger. We do not think that this contract shows such a financial advantage to Jacob Schwartz as a court of equity can appropriate to the payment of a judgment against him.

2. We think the second claim of the plaintiff has more merit. When Christian Schwartz and Betty Schwartz took the title of this property and began occupying it as their home, they acquired a homestead interest in it. A homestead may be taken in the property of either husband or wife, and, as the title to this property was taken by the husband and wife in common, the homestead exemption would apply to their joint ownership, the lot which they occupied as a home being of the value of the homestead exemption. The interest of the defendant Christian Schwartz in the other lot would, as against his creditors, be no part of the homestead and would be liable for his debts. When Christian Schwartz transferred this interest in the remaining lot to his wife without consideration, the indebtedness upon which this judgment was rendered

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existed, and the transfer was in fraud of his creditors. Christian Schwartz furnished \$1,500 of the purchase price of the lots. He and his wife therefore obtained not more than a two-thirds part of the property from Jacob Schwartz, and if they fail to perform their contract should return the same to him. The district court should have subjected an undivided one-half interest in the lot not exempt to the payment of this judgment.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HENRY A. TRILLER, APPELLANT, V. JAMES SADLE, APPELLEE.

FILED NOVEMBER 27, 1912. No. 16,697.

1. **Principal and Agent: OSTENSIBLE AUTHORITY.** Ostensible authority to act as agent for the principal may be inferred if the party to be charged as principal affirmatively, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency. *Thomson v. Shelton*. 49 Neb. 644.
2. ———: **GENERAL AGENTS.** Where the name of the principal was signed to a lease by a firm of persons who signed the principal's name, by themselves, as agents, and subsequently attempted to collect the money due on the lease by superintending the giving of the bill of sale executed by the original lessee to the plaintiff, their principal, and obtained possession of the hay growing on the land leased by means of an action of replevin maintained in the name of their principal, they will be held to have been the general agents of the plaintiff, and the plaintiff will be bound by what they did.
3. **Replevin: EVIDENCE.** The evidence examined, and held to support the judgment of the district court.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

William E. Shuman, for appellant.

Hoagland & Hoagland, contra.

HAMER, J.

The plaintiff Triller seems to have been the owner of certain land in Lincoln county. He executed a lease of this land, or a part of it, to one C. W. Hutchinson. The plaintiff did not reside in the state, but seems to have been represented by Bratt & Goodman, a firm at North Platte, and the lease was signed "H. A. Triller, per Bratt & Goodman, Agts." Triller is the appellant and the plaintiff in the court below. The mortgage lease seems to have provided that the rental of the land, \$115, was to be paid on or before December 1, 1908, with interest from date, and the lessee of the land agreed in the lease that there should be a lien upon the hay grown upon the land during that year. On the 4th of May, 1908, the date of the lease, it is not probable that the grass had grown much, but it was probably alive and growing a little, so that it was in existence. The lease was filed for record May 19, 1908. On October 14, 1908, no part of the lease money seems to have been paid, and James Sadle, the defendant and appellee, seems to have been hauling the hay away. To prevent Sadle from getting the hay, an action of replevin was brought by the plaintiff, Triller, against him in the county court. The plaintiff had the verdict and judgment, and the defendant appealed to the district court. The case was tried in the district court, where the defendant obtained a verdict and judgment. Before the commencement of the replevin suit, but about the time the same was commenced, and on October 14, 1908, Bratt & Goodman received from Hutchinson a bill of sale of all the hay upon the land, and which was executed to their principal, Triller. This seems to have been done the day the replevin case was commenced, and after this hay was cut. It is claimed on the part of the plaintiff that Bratt & Goodman were without authority to collect the money, and it is contended that they did not bind the plaintiff by what they did, except as to the making of the lease. Whatever the fact may be, they seemingly exercised the right to do whatever they

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claimed was necessary to enable them to secure and collect the money for their principal, the plaintiff in the case. At any rate, they were taking care of the plaintiff's business seemingly as best they could.

The affidavit for replevin alleged, among other things, "that he (the plaintiff) is the owner of the following described property, to wit: All the hay located upon * * * part of said hay being in stack, part baled and part loose, upon the above described land; * * * that said plaintiff is entitled to the immediate possession of said property." The petition alleged, among other things: "That the plaintiff had * * * a special interest in said hay, in that one C. W. Hutchinson, on May 4, 1908, executed and delivered to this plaintiff a chattel mortgage lease by the terms of which the said Hutchinson, who was at that time the owner of all of said hay, mortgaged the same to this plaintiff to secure the payment of the sum of \$115, and interest at 8 per cent. per annum, from May 4, 1908." It was also alleged that the same was a valid indebtedness from said Hutchinson to the plaintiff, and a copy of the chattel mortgage lease was attached to the petition as exhibit "A." In the third paragraph of the petition it was alleged: "That thereafter, on October 14, 1908, and prior to the commencement of this action, the said C. W. Hutchinson delivered to the plaintiff herein the possession of all of said hay, and also gave this plaintiff the right of possession thereof, and executed and delivered to this plaintiff a bill of sale of said hay conveying to the plaintiff all the interest and ownership of said hay not conveyed by the mortgage above described, a copy of which bill of sale is hereto attached and marked exhibit 'B.'" In the fourth paragraph it was alleged that the plaintiff was, at the commencement of this action, and now is, entitled to the immediate possession of all of said hay. And in the fifth paragraph it was alleged that the said hay was at the commencement of this action wrongfully detained by the defendant. It will be seen that the plaintiff claimed both by reason of the chattel mortgage lease and also by reason

of the bill of sale. While the mortgage was not yet due when the case was commenced, it is claimed that the instrument entitled the plaintiff to possession, and that therefore he was entitled to maintain his action of replevin against the mortgagee and against any stranger, even though the mortgage was not yet due.

The bill of sale was dated October 14, 1908, in the consideration of the sum of \$1 and other considerations paid by Henry A. Triller. It undertook to grant, sell, transfer and deliver to the said Triller, his executors, administrators and assigns, all the hay now located upon the particular land (describing it) in Lincoln county, Nebraska, "part of said hay being in stack, part baled, and part bunched on the ground." It also described the hay as "all of the hay grown upon said premises during the year 1908, wherever situated, whether located on wagons or racks." It also proposed to sell and assign all Hutchinson's interest in and to the proceeds of certain hay grown on the above-described land and delivered to Harrington & Tobin, and authorized Triller, or his agents, to collect such proceeds. It also contained this clause: "It is my intention by this instrument to fully convey all my interests in the hay which I mortgaged to the said Triller on May 4, 1908, by a written chattel mortgage lease."

Upon the trial the defendant sought to prove that he was the owner of 20 tons of loose hay and 21 tons of stacked hay, and that the plaintiff took this hay in the writ of replevin. Of course, the main question to be determined is, who was entitled to the possession of the hay.

Upon the trial Mr. Goodman, of the firm of Bratt & Goodman, testified: "We were agents for the owner of the land, Henry A. Triller, *for leasing it.*" An effort was made to show that the agency of Bratt & Goodman for Triller was a restricted or special agency, and that they were not the general agents of the plaintiff. The defense was that after the chattel mortgage lease had been filed the lessee, Hutchinson, entered into a contract with one Shaw to cut, stack and bale the hay for one-half of it, and that

Shaw, learning about the mortgage to the plaintiff, Triller, went to North Platte to see Mr. Bratt, of the firm of Bratt & Goodman, agents of Triller, and that he had a talk with Mr. Bratt in which it is claimed that Mr. Bratt told him (Shaw) that he might go ahead and put up the hay in controversy, but that he should leave one-half of it upon the ground. While an examination of the bill of exceptions shows that Shaw did not testify, others undertook to relate what was said in the conversation between Bratt, of the firm of Bratt & Goodman, and Shaw. It is also claimed that the defendant, Sadle, had certain conversations with Mr. Bratt along the same line, and in which Mr. Bratt said that Shaw was to have half of the hay for cutting it. Sadle himself testified to a deal with Shaw with reference to cutting and stacking the hay, and that he afterwards saw Hutchinson, and that he and Hutchinson divided the hay. Sadle also testified that he talked with Goodman in North Platte, and that Goodman asked him if he was hauling the hay from Shaw's and, when he told Goodman that he was, then Goodman told him he did not want him to haul any more hay "until they (meaning Bratt & Goodman, for their client, Triller) had got their money." Sadle then testified: "I told him that we had divided the hay, and I was going to haul my half of it right along. He said, 'You can't do it,' and I said I was going to do it, anyhow." Sadle also testified to a conversation with Mr. John Bratt, of the firm of Bratt & Goodman. They talked about putting up the hay, and Bratt told him that the hay was mortgaged, and then he (Sadle) wanted to quit. He told Bratt that he was not going to do anything more, and then Bratt told him to go ahead, providing Hutchinson would give up his half of the other hay, the Triller hay, and then Hutchinson said that he was willing to give up the hay, and that Bratt at that time made no claim to both halves of the Triller hay. Sadle testified that at that time Bratt or Triller were not claiming any interest in the Triller hay, other than half, which Hutchinson was to have. Sadle testified that Bratt

was just claiming half of the hay on the ground, "the Triller half." Mr. Bratt testified as a witness, and denied the statements attributed to him by these witnesses. The defendant claimed that he secured the right to take one-half of the hay without regard to the mortgage upon the same, and that he was authorized to do so by what Bratt said to him. The plaintiff attempts to make the point that there was no evidence to the effect that Triller, the plaintiff, authorized Bratt to make these statements, and had no knowledge that Bratt made such statements, or that Bratt in any way ratified what was done. While Mr. Goodman, the other member of the firm of Bratt & Goodman, testified that Bratt & Goodman were the agents of the owner of the land simply for the purpose of "leasing" it, yet they seem to have sold the hay after possession was obtained under the writ of replevin. Over the plaintiff's objections, the defendant was permitted to introduce evidence to the effect that, after the chattel mortgage had been filed, Hutchinson had agreed with Shaw to divide the mortgaged hay if he (Shaw) would cut, stack and bale it; that Shaw delivered his interest in the contract to the defendant, Sadle, and that the hay was divided. There was testimony tending to show that the hay had been divided at the time the replevin suit was commenced, and that Sadle's share of hay under the division was taken away from him by the replevin proceedings.

There is a most strenuous contention that the plaintiff, Triller, never authorized Bratt to make any statement whatever to either Shaw or Sadle to the effect that any one might go ahead and cut, stack, and bale the hay, and that Bratt was getting outside of his authority if he said anything of that kind. It is claimed, on behalf of the plaintiff, that after Bratt & Goodman leased the land to Hutchinson their powers ended, and that, that being the fact, any talk that Bratt had with Shaw or Sadle about cutting the hay and dividing it was improperly received. It is also claimed that the instructions of the court improperly submitted to the jury the question of whether or not

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Bratt & Goodman, on behalf of the plaintiff, Triller, had agreed with Shaw that he (Shaw) might have half of the hay in consideration of cutting and harvesting it.

Whether Bratt & Goodman were "special" agents or "general" agents, they were all the agents there were, and they seem to have authorized everything to be done that was done, and they hardly have the right to say that they had less authority than they exercised for the benefit of their principal. If the hay had not been cut, the plaintiff would have had no hay and no pay for the use of the land. While Bratt & Goodman made a contract for their principal to take a mortgage upon the hay for the purpose of securing the payment of the amount promised to be paid for the use of the land, it is apparent that they would have received nothing if somebody had not cut the hay, because there would have been nothing out of which to realize the rent money. If the hay was cut, the men who cut it ought to be paid. There was no hay before the grass was cut and cured. Bratt & Goodman had authority to make the original bargain for their principal. They seem to have had authority to take the subsequent bill of sale which was delivered to them to secure the money due for the rent of the land. At least they proceeded. When they got this bill of sale, there was immediately a replevin suit under which possession was taken, and they sold the hay which they got under the writ of replevin. If they had the authority to take the bill of sale, they apparently had the authority to secure the payment of the money and to collect it. It would seem to be better to hold that Bratt & Goodman had the right to bind their principal, the plaintiff, than to hold that the men who cut the hay, and therefore made it valuable to the plaintiff and enabled him to get his money out of it, are to do without the money necessary to pay them for their labor. Bratt & Goodman zealously looked after the interest of their principal, Triller. Triller has accepted the proceeds of the property and the work of Bratt & Goodman as his agents. During the summer, when it was apparent that Hutchinson was

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not going to cut the hay upon which Triller had the lien of the chattel mortgage lease, and afterwards when Shaw was about to quit, and when Sadle was about to quit, then Bratt & Goodman were active in getting the hay cut and stacked so that they could get the rent of their principal out of it. Of course, if Shaw had not cut the grass, it would have been left standing and would not have been hay; it would have gone back into the ground again. But when Bratt & Goodman told Shaw to go ahead and cut the grass and leave half of it on the ground, and when Bratt told Sadle to go ahead, they were both exercising business thrift on behalf of their principal. While it is true that Mr. Bratt testified that he was not acquainted with Shaw, he did not fully deny his conversation with Sadle, but whatever this testimony may have been it was fairly submitted to the jury, and the jury found in favor of the men who cut and stacked the hay.

In view of what was done in the premises by Bratt & Goodman on behalf of their principal, we think that the instructions of the court to the jury were correct, and that when the jury found against the plaintiff they determined the agency of Bratt & Goodman to be a general agency to lease the land and collect the rent. The agency was shown. *Crilly v. Ruyle*, 87 Neb. 367; *Cooper & Cole Bros. v. Cooper*, 90 Neb. 209; *Creighton v. Finlayson*, 46 Neb. 457; *Thomson v. Shelton*, 49 Neb. 644; *Quinn v. Dresbach*, 75 Cal. 159, 16 Pac. 762; *Kasson v. Noltner*, 43 Wis. 646; *Brown v. Eno*, 48 Neb. 538; *Bankers Life Ins. Co. v. Robbins*, 55 Neb. 117; *Phoenix Ins. Co. v. Walter*, 51 Neb. 182; *Faulkner v. Simms*, 68 Neb. 295; *Oberne v. Burke*, 30 Neb. 581. The acts of Bratt & Goodman on behalf of their principal seem to have been ratified. Not one of them has been disavowed.

Notwithstanding the ingenious and plausible argument of counsel for the plaintiff, we are constrained to hold that the trial court committed no error in the instructions given and rulings made, and that the judgment was properly rendered for the defendant.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and SEDGWICK, JJ., concur in the conclusion only.

HENRY J. LENDERINK, ADMINISTRATOR, APPELLEE, v. B. F. SAWYER ET AL., APPELLANTS.

FILED NOVEMBER 27, 1912. No. 16,805.

1. **Courts: RELIEF: EXECUTOR DE SON TORT: SET-OFF.** Where the defendant, who was the coroner of Dakota county, and his surety, the defendant company, were sued by the administrator of the estate of one Robert Reed, deceased, who sought to recover from them the value of certain personal property which had belonged to said Reed at the time of his death, and which had been sold by the defendant coroner immediately after the death of the deceased and to enable him to pay the necessary expenses of the funeral, and he had sold the property for its full and fair value, and had used the proceeds for that purpose, and at the request of the nephew of the deceased and his son, *held*: (1) That the defendants were entitled to set off the money paid out for the necessary expenses of the funeral against the plaintiff's claim. (2) That the district court, having the parties before it and having jurisdiction of the subject matter and the parties, should adjudicate and determine the whole matter, instead of rendering judgment against the defendants and then sending the coroner to the county court to file claims against the estate, thereby unnecessarily increasing the expenses of the litigation.
2. **Executors and Administrators: EXECUTOR DE SON TORT: PAYMENT OF FUNERAL EXPENSES.** Under the facts shown, the defendant Sawyer was at most an executor *de son tort*. The true representative is bound by those acts of an executor *de son tort* which are lawful and such as the true representative would be bound to perform in the due course of administration. As the administrator of the estate of the deceased would be bound to pay the funeral expenses, if they were not already paid, he cannot complain because the coroner paid them.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed.*

Paul Pizey, for appellants.

J. J. McCarthy, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Dakota county against the coroner of that county and the surety on his official bond. The suit was brought by the administrator of the estate of Robert Reed, deceased. It appears that one Robert Reed died intestate at his home in Dakota county while living alone; that when his body was found the defendant, Sawyer, at the request of the nephew of the deceased, took charge of the body and gave it a Christian burial; that he took possession of certain personal property of the deceased, sold it for its full value, and applied the proceeds to the payment of the expenses necessarily incurred for the burial casket, the lot in the cemetery, etc. The plaintiff, as administrator, brought this action to recover the value of the personal property so sold. On the trial the defendant offered to prove as a matter of set-off that the expenses incurred by him were proper and necessary, and were just and reasonable in amount; that the property was sold with the consent of the nephew and a son of the deceased, or at least the son ratified the sale; that the amount realized from the sale was the full value of the property; and the defendant sought to set off his expenses against the sum received by him for the sale of the property. The proposed evidence was rejected, and the court directed the jury to return a verdict against the defendants for the amount that the defendant Sawyer realized from the sale of the property. The verdict and judgment rendered were for \$499.72. For the rejection of the evidence so proffered and the giving of the peremptory instruction, the defendants assign error.

It is claimed by the defendants that the administrator is estopped from prosecuting the action; that all the

charges made by the defendant were reasonable and just; and there seems to be no controversy concerning the fact that defendant Sawyer sold the property and paid the funeral expenses with the proceeds. One purpose of an administrator is to take charge of the property belonging to the estate. He becomes the means by which the property belonging to the estate is applied to the payment of debts, if there are any, and the surplus remaining is distributed among the heirs. The statute in this case seems to contemplate that those of the relatives who are near the deceased are charged with the duty of taking care of the body and burying it. If the defendant Sawyer carried out the wishes of the relatives who were there, it would appear that the other relatives would have no reason to complain. As the administrator represents the creditors and the heirs, and is only a trustee, he is estopped from maintaining an action against the defendant Sawyer and his bondsmen for doing that which Sawyer was requested to do, and which he actually did, in taking charge of the body of the deceased and burying it. In *Dame, Probate and Administration*, sec. 231, it is said: "All courts generally hold that the personal representatives may pay the same (funeral claims) directly without their being exhibited." If this be true with respect to personal representatives, it should be true of the coroner who is requested by the personal representatives to discharge the duties which are a natural burden upon them.

It is altogether probable that when Sawyer sold the property he thought he was authorized to do so by section 110, ch. 18, art. I, Comp. St. 1909: "When any valuable personal property, money, or papers are found upon or near the body upon which an inquest is held, the coroner shall take charge of the same and deliver the same to those entitled to its care or possession; but if not claimed, or if the same shall be necessary to defray expenses of the burial, the coroner shall, after giving ten days' notice of the time and place of sale, sell such property, and after deducting coroner's fees and funeral expenses, deposit the

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proceeds thereof, and the money and papers so found, with the county treasurer, taking his receipt therefor, there to remain subject to the order of the legal representatives of the deceased, if claimed within five years thereafter, or if not claimed within that time, to vest in the school fund of the county." He was brought face to face with the problem of giving the body of the deceased decent and immediate Christian burial. The sale of the property would furnish the means of paying the very necessary expenses of the funeral. He sold it, got the money, and used it. The dead man seems to have been decently and properly buried according to Christian rites. The defendant is equitably entitled to his pay for it, and it is not quite right that the plaintiff should have judgment against him. We do not intend to hold that the section quoted justified the conduct of the coroner. The same is justifiable upon other grounds. We think that if the defendant Sawyer was requested by the nephew, Bert Reed, to take charge of the body and to prepare it for burial, and that he did so because of such request, and that he sold the property for its full and fair value, which is not questioned, and used the money which he received therefor in payment of the necessary funeral expenses, then he is equitably entitled to pay therefor, and he is further equitably entitled to set off the money so paid out by him against the plaintiff's claim for the value of the property sold. The same is true if the matter was ratified and adjusted between the defendant Sawyer and the son of the deceased, Earnest Reed. We do not undertake to say what, if any, steps should have been taken before the county court towards proving these claims, because that question is not before us.

"The true representative is bound by those acts of an executor *de son tort* which are lawful and such as the true representative would be bound to perform in the due course of administration." 18 Cyc. 1361. Among the authorities cited is *Thompson v. Harding*, 75 E. C. L. (Eng.) 630, holding that a proper payment to a creditor of the estate will bind the true representative. In that case

Richard Smith was employed to receive the rents of the deceased in his lifetime, and after his death continued to receive the rents due to the deceased. No other representative of the deceased appearing, Smith paid various debts due from the deceased. Among other things he paid the defendants, who were bankers of the deceased. A considerable time after payment administration was granted to the plaintiff, who brought the action. The court held, under the facts, "that the rule to enter a verdict for the plaintiff ought to be discharged."

In *Outlaw v. Farmer*, 71 N. Car. 31, John Farmer gave his promise in writing to pay John Lewis or James Parker, agents, by agreement with the heirs of Anna Herring, deceased, the sum of \$125.50. Lewis and Parker were appointed agents by the heirs of Anna Herring. As the agents of such heirs, they had charge of the entire beneficial interest in the estate. In a suit by the duly appointed administrator of the estate against the makers of the promise, it was held: "Administration was only the technical form of passing the legal estate from the intestate to the distributees. Without administration they had the potential dominion over the estate, and could dispose of it by sale, gift or testament. Therefore, a sale by their agent conferred upon the purchaser a title which the courts will protect. The bond given for the property was given on a valuable consideration and is valid, both as to the principal and as to the sureties." The court further said: "Where the equitable as well as legal rights of parties are administered, the bond sued on will be upheld as valid against the defendant, and the plaintiffs are entitled to judgment thereon."

"Although an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts not for his own benefit which a rightful executor might do." 18 Cyc. 1363.

In *Brown, Adm'r, v. Walter*, 58 Ala. 310, it was held: "Where one has received and used assets of an intestate, under circumstances constituting him an executor *de son*

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tort, he may show, when called to account in equity by the rightful representative, that there are no outstanding debts, and that he has applied the assets for the use and benefit of the distributees, as they must have been applied in due course of administration."

In *Risk v. Risk*, 10 Ky. Law Rep. 566, 9 S. W. 712, R., having paid the first instalment on land, died, leaving a widow and six children, and the defendant, without administering on the estate, but with the concurrence of the plaintiff, undertook to pay the deferred payments and to support the widow and minor children, and he failed to make the third payment, and the land was sold under a judgment by the vendors, and when A. advanced to the defendant money to redeem the land, and the widow and heirs obtained an order for the sale of the land to pay A., who purchased and offered to permit the widow and heirs to redeem, and he conveyed the land to defendant, who paid the balance of the purchase money, in an action by plaintiff for the settlement of the estate of the father, a division of the land, and allotment or dower, held, that the acts of defendant should be treated as those of a duly appointed administrator from the date of the father's death, and that he holds the land in trust for the widow and heirs.

It is incumbent upon the executor *de son tort* to show that he has applied the assets which have come into his hands in the same manner in which they would have been lawfully applied by a rightful representative. 18 Cyc. 1363. Among the authorities cited in support of the doctrine stated is that of *Gay v. Lemle*, 32 Miss. 309, holding that, where it appears that he has paid one particular debt not entitled to preference, leaving others unpaid, he cannot claim that he has done what the law required to be done with the assets in due course of administration, but must be liable as executor *de son tort* to the other creditors. But in that case the doctrine announced emphasizes the contention that the executor *de son tort* is entitled to fair treatment if he has acted justly. The syllabus in that

case reads: "If an executor *de son tort*, when sued by a creditor, attempt to justify his unlawful intermeddling with the assets of the deceased by showing that he has applied them to the payment of his debts, he must show that he has applied them in the same manner that they would have been lawfully applied by the rightful executor, and if it appear that he has expended the assets in the payment of one particular debt, not being a lien on them, leaving others unpaid, he will be liable to the other creditors." The body of the opinion fully sustains the syllabus, and requires only that the executor *de son tort* "must show that he has applied them (the assets of the estate) in the same manner in which they could have been lawfully applied by the rightful executor."

In *Holeton v. Thayer*, 89 Ill. App. 184, it was held that where a person named as executor in a will acts without qualifying, and receives proceeds of the sales of lands and rents, the burden is upon him to account for the same, and, if he assumes to pay debts without having them probated against the estate, he assumes the burden of producing evidence that would be sufficient to prove such claims in the probate court in case of objection.

In *Crispin v. Winkleman*, 57 Ia. 523, it was held: "One who intermeddles with the estate of a decedent, without having been appointed administrator, has no right to pay claims out of the assets of the estate; and in no case can he escape liability for so using the money of the estate, without an affirmative showing that the amounts paid were correct."

Since the district court has acquired jurisdiction of the parties, and the whole subject matter is presented for adjudication, nothing can be gained by rendering a judgment against the defendant and compelling him to file his claim against the estate, thus unnecessarily increasing the litigation and costs. We think that the district court should dispose of the whole case before it. There is no showing that the deceased was in any way indebted. The estate is solvent. The defendant is not shown to have

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injured any one by reason of what he did. The claim of no creditor is endangered.

It follows that the district court erred in excluding evidence tending to show that the money received from the sale of the property was expended in and about the burial of the deceased.

The judgment of the district court for Dakota county is

REVERSED.

LETON and FAWCETT, JJ., concurring in result only.

We think the principles announced in *Phillips v. Phillips*, 87 Me. 324, and *Adams v. Butts*, 16 Pick. (Mass.) 343, apply, and hence concur in the result.

SEDGWICK, J., concurs in the conclusion.

LEE A. HANKS, APPELLEE, v. MISSOURI PACIFIC RAILWAY
COMPANY, APPELLANT.

FILED NOVEMBER 27, 1912. No. 17,058.

1. **Carriers: ACTION: DEFENSE: INTERSTATE SHIPMENTS.** In an action to recover from the defendant railway company the necessary cost of the labor, lumber and material used in constructing grain doors for box cars used in transporting grain from Cook, Nebraska, to Kansas City, Missouri, *held*, that the answer of the defendant company that the interstate commerce commission had made a rule to the effect that the carrier might not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars, unless expressly so provided in its tariff, and that there was no such provision in the tariff of the defendant company at the time the doors were so furnished (though afterwards one was adopted), and therefore that the defendant company was not liable, failed to state any defense.
2. ———: ———: ———: ———. That, as there is no allegation in the pleadings stating when the particular rule was adopted, it will not be presumed to have been adopted before the car doors were furnished, or to have been in force at that time.

APPEAL from the district court for Johnson county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

B. P. Waggener and Edgar M. Morsman, Jr., for appellant.

Hugh La Master, contra.

HAMER, J.

On the 18th day of April, 1910, the plaintiff, who was a dealer in grain, lumber, coal, and live stock, at the village of Cook, Johnson county, Nebraska, sued the defendant in the district court for Johnson county, alleging his business, and that he was the sole owner thereof; that the defendant was a railway corporation, incorporated under the laws of the state of Missouri, licensed to do business in the state of Nebraska, and doing a general transportation business as a common carrier, with lines of railroad in the state of Nebraska and in other states, having a line of railroad running from Talmage, Nebraska, through Johnson county, Nebraska, and through the village of Cook, in said county, to Crete, Nebraska; that defendant maintains a depot at said village of Cook, and an office at said depot, and keeps a duly appointed agent in charge of said office for the management of its business at said village; that from the 26th of July, 1906, until the 17th of January, 1908, the plaintiff at the request of the defendant, made by the agent of the defendant, at Cook, Nebraska, sold, delivered and furnished to the defendant certain lumber and nails, and furnished certain labor to the defendant, all of the value of \$271.03; that said articles were so furnished in repairing freight cars belonging to the defendant, and freight cars of other companies then being used by the defendant, all of which cars were loaded and shipped by the plaintiff to points on the lines of the defendant, and all of which articles were necessary to put said cars in proper repair and condition for the transportation of grain and stock, and were not made for the

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purpose of violating any law, either state or federal, and in the construction of inside doors for grain cars owned and used by the defendant; that an itemized bill of said lumber, showing the dates when furnished, amounts, dimensions, kinds and prices, was attached to the petition as a part thereof; that the same were just and reasonable prices, and were the prices agreed upon, and that the lumber was of the aggregate value of \$211.03; that nails were furnished as needed in making said repairs and said car doors from July 26, 1906, to January 17, 1908, and of the reasonable value of \$10, and that labor was furnished as needed in making said repairs and car doors from July 26, 1906, to January 17, 1908, and of the reasonable value of \$50; that by reason of the sale, delivery and furnishing of said lumber and nails, and the doing and furnishing of said labor, the defendant became indebted to the plaintiff in the sum of \$271.03, for the payment of which the plaintiff has made demand of the defendant, and which the defendant has refused to pay. The prayer was for judgment against the defendant for \$271.03, with interest at 7 per cent. from July 17, 1908, and costs.

The defendant answered, omitting the title of the case, the signature of counsel, and the verification, as follows: "Comes now the defendant, and, for its answer to the petition of the plaintiff, it admits that plaintiff furnished the material and labor in the amount and of the value stated in the petition, and defendant states: That any and all lumber which may have been furnished by the plaintiff, as alleged in his said petition, was furnished for the purpose of constructing grain doors, or making repairs upon certain grain cars, which were furnished by the defendant to the plaintiff for the transportation of grain in the regular course of interstate commerce; that each of the said cars, so furnished or repaired, moved from Cook, in the state of Nebraska, to Kansas City, in the state of Missouri, and beyond; that, by reason of such shipments of grain being of an interstate character, this court is without jurisdiction in the premises to hear or try this

case. The defendant alleges that, at the time the plaintiff claims to have furnished such lumber for grain doors, the defendant did not have, regularly published and filed with the interstate commerce commission, and posted as required by law, any tariff or any provision of any tariff, whereby the defendant promised, or agreed or was permitted, to reimburse the plaintiff for and on account of lumber so furnished. Plaintiff alleges that the interstate commerce commission, by rule 78 of bulletin 2 of the conference rulings of the commission, made a ruling as follows: '78. Grain Doors. A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff.' In construing and applying such ruling, the interstate commerce commission held that, if carriers proposed to pay shippers for grain doors furnished by such shippers, where the same were necessary and were actually furnished, carriers could pay the actual cost of such doors with stated maximum allowance per grain door and per car, provided same were covered by their tariffs; that, following the ruling of the interstate commerce commission, the defendant company thereafter regularly published and filed with the interstate commerce commission an amendment to its tariffs, which became effective November 16, 1908, as follows: 'When cars furnished for grain-loading, requiring interior doors, are not so equipped by the railroad company, and such doors are furnished by the shippers, the actual cost thereof (when not to exceed \$1.20 per car) will be paid by this company.' That such amendment to defendant's tariffs was made subsequent to the time the plaintiff claims to have furnished the lumber for the grain doors in question, such lumber having been furnished from July 26, 1906, to and including January 17, 1908. The defendant states that payment by it to the plaintiff for the grain doors in question, without authorization therefor from the interstate commerce commission, would be a violation of the interstate commerce act, and would subject, not only the plaintiff, but also the defend-

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ant, to a severe penalty. The defendant states that this honorable court is not only without jurisdiction in this matter, to enforce payment for grain doors prior to November 16, 1908, but its order so to do would be requiring the defendant company to violate the interstate commerce act; that the defendant has no desire in any way to take advantage of the plaintiff, and stands ready and willing at all times to reimburse and pay to the plaintiff any and all amounts which it may be authorized to pay by the interstate commerce commission, and the defendant alleges that, if the plaintiff has furnished lumber as claimed by him, the same would have been paid for in due course by the defendant, had such payment not been in violation of the law. Wherefore the defendant asks that it shall go hence without day, and recover its proper costs."

A general demurrer was filed by the plaintiff to the defendant's answer. Whereupon it was, on or about the 8th day of October, 1910, considered by the court that the said demurrer to the answer should be sustained. The defendant elected to stand upon its said answer, and refused to plead further, whereupon judgment was rendered for the plaintiff in the sum of \$313.71, with interest from the date of the judgment at 7 per cent. per annum, and the costs.

It would seem that the question presented is whether the plaintiff can recover for repairs to freight cars and for grain doors furnished for freight cars, such cars having been furnished by the defendant for transporting grain shipped by the plaintiff in interstate traffic. If the plaintiff cannot recover, it must be because of provisions contained in the interstate commerce law, and amendments thereto. The appellant seems to particularly rely on sections 3, 6 of the act of 1887 (24 U. S. St. at Large, ch. 104, p. 379), and on the Elkins act, approved February 19, 1903 (32 U. S. St. at Large, pt. 1, ch. 708, p. 847). The act as amended may be found in Drinker, Interstate Commerce Act (Supplement), and allied acts, pp. 1-75. They may also be found in the act approved February 4,

1887 (24 U. S. St. at Large, ch. 104, p. 379), amended by act approved March 2, 1889 (25 U. S. St. at Large, ch. 382, p. 855); by act approved February 10, 1891 (26 U. S. St. at Large, ch. 128, p. 743); by act approved February 8, 1895 (28 U. S. St. at Large, ch. 61, p. 643); by act approved June 29, 1906 (34 U. S. St. at Large, pt. 1, ch. 3591, p. 584); by act approved April 13, 1908 (35 U. S. St. at Large, ch. 143, p. 60); by an act approved June 18, 1910 (36 U. S. St. at Large, ch. 309, p. 539). Section 3, among other things, provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 6, among other things, provides: "That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act." Among other things, it is provided in said section that the schedules shall be printed in large type, and that copies shall be kept for the use of the public in every depot or station, also that no advance shall be made in the rates, fares, and charges except after 10 days' public notice, the notice to plainly state the changes proposed to be made in the schedule then in force. Section 3 remains as it was originally adopted, but section 6 has been amended. As amended, it is provided in section 6 that, when the rates have been established and published, it shall be unlawful for the common carrier to charge, demand, collect, or receive from any person a greater or less compensation than

is specified in such published schedule of rates, fares, and charges; that every common carrier shall file with the commission copies of its schedules of rates, fares, and charges, and shall notify the commission of all changes made, and shall also file with the commission copies of all contracts, agreements, or arrangements in relation to any traffic affected by the provisions of the act. There is also a penalty for failure to comply with the requirements of the act, such failure being punishable as a contempt.

The foregoing provisions are probably intended to prevent favoritism and the giving to one shipper an advantage over another. It is plain that the plaintiff should recover for the labor and material furnished, unless the statute is in derogation of the common law and thereby forbids it. To pay a reasonable and just price for the labor and materials furnished does not of itself give the appellee undue or unlawful preference or advantage. The payment of a debt is not giving an undue preference or advantage. But it is claimed that the rule adopted by the interstate commerce commission wholly prevents the transaction itself, and that therefore there can be no recovery. It is claimed that the transaction is of such a nature that the defendant company might pay one shipper one price for the labor and grain doors and pay another shipper another price, and that there is thereby created a chance to be dishonest and to violate the original intention of the law which forbids discrimination.

Rule 78, adopted by the commission and set forth in the answer to which the demurrer is interposed, makes the reimbursement of shippers for expenses incurred in attaching grain doors to box cars unlawful, unless expressly provided for in the tariff of the common carrier. It is alleged in the answer that the defendant filed with the commission an amendment to its tariffs, which became effective November 16, 1908, and that this amendment provided that, when the cars required interior doors and the shipper furnished them, then the company would pay to the shipper the actual cost of the doors, not exceeding \$1.20 per

door, and that the amendment was made after the time that the plaintiff claims to have furnished the doors in question. The date fixed in the petition when the grain doors were furnished seems to be from July 26, 1906, to January 17, 1908. The amendment was made to the defendant's tariff November 16, 1908, being about ten months from the time the last item of the grain doors was furnished. It does not appear from the answer when rule 78 was adopted. Ten months elapsed after the last item of the grain doors was furnished before the tariff required was filed with the interstate commerce commission and became effective. In that ten months the rule may have been, and probably was, adopted. If so, it was after the grain doors were furnished. There would be nothing in the way of paying for the grain doors if they were furnished before rule 78 was adopted. For anything that appears in the answer, the rule had not yet been created, and was therefore not in existence when the doors were furnished.

It is the duty of the railway company to furnish the shipper a car that is fit to use. Perhaps the railway company fails to do so because of difficulties in the way. It may have been that the car doors have been stolen. Perhaps they have been broken up. At any rate they are missing, and the agent of the railway company is not in a condition perhaps to furnish the doors, and therefore the shipper may be compelled to rely upon his own ingenuity, labor and material. Therefore he builds the door and puts it in the car. The rule of the interstate commerce commission is based upon the idea that such an opportunity as this will be utilized by the railway company and the shipper in paying and securing unjust rebates. This reasoning is based upon the assumption that men in an ordinary commercial transaction are likely to have a secret agreement, and that unlawful rebates will be collected to the special advantage of the particular shipper who builds the car doors. We simply take the view that, before payment for the grain doors can be forbidden, the rule must have been

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in force when the labor and materials for the grain doors were furnished.

The plaintiff brought the action to recover for labor and material furnished to the defendant. The whole defense was that the plaintiff was engaged in interstate shipment, and furnished labor and material in connection therewith, and that the defendant was forbidden to pay such charges by rule of the interstate commerce commission. A general demurrer to the answer was sustained and judgment rendered for the plaintiff. It does not appear from the answer that the rule was in force at the time the shipments were made and the labor and material furnished. Of course, the rule could not be retroactive, and the answer therefore states no defense.

The judgment is

AFFIRMED.

SEDGWICK, J., concurring only in the result.

The plaintiff brought the action to recover for labor and material furnished to the defendant. The whole defense was that the plaintiff was engaged in interstate shipment, and furnished labor and material in connection therewith, and that the defendant was forbidden to pay such charges by rule of the interstate commerce commission. A general demurrer to the answer was sustained and judgment rendered for the plaintiff. The defendant has appealed.

The rule relied upon is set out in the answer. It relates only to "grain doors to box cars." The petition counts upon lumber, labor and nails furnished in repairing the cars of the defendant. The answer says nothing about the labor and nails, and alleges that the *lumber* furnished by plaintiff "was furnished for the purpose of constructing grain doors or *making repairs upon certain grain cars.*" without specifying that the doors were for box cars, or how much, if any, was for constructing grain doors. These allegations do not constitute a defense to plaintiff's claim. Moreover, it does not appear from the answer that the rule relied upon was in force at the time the shipments

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were made and the labor and material furnished. Of course, the rule could not be retroactive, and for this reason, also, the answer fails to state a defense.

ROSE and FAWCETT, JJ., concur in this opinion.

FREDERICK E. SCHWARTZ, APPELLANT, v. ANDERS ANDERSON, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,814.

1. **Adverse Possession: EVIDENCE.** It is shown by the uncontradicted evidence that defendant has been in the open, continuous and exclusive possession of the land in question for more than 10 years prior to the commencement of an action in ejectment, claiming to be the owner thereof, and that during said time plaintiff occupied and owned adjoining land and recognized defendant's possession as such owner, and that during all of said time plaintiff might have instituted an action contesting defendant's right. *Held*, That the statute of limitations had run in favor of defendant, and that ejectment could not be maintained.
2. ———: ———. The fact, if true, that the land involved in litigation was not correctly described in defendant's muniments of title would not prevent the running of the statute of limitations in his behalf, as between him and another claimant, there being no question of the identity of the particular land occupied and claimed by him.
3. **Appeal: VERDICT: EVIDENCE.** "If a verdict is the only one justifiable by the evidence, instructions to the jury will not be examined." *Kielbeck v. Chicago, B. & Q. R. Co.*, 70 Neb. 571.

APPEAL from the district court for Dundy county: ROBERT C. ORR, JUDGE. *Affirmed*.

W. S. Morlan, for appellant.

Lambe & Butler, *contra*.

REESE, C. J.

This is an action in ejectment. Plaintiff alleged in his amended petition that he was the owner and entitled to

the immediate possession of "lot numbered six (6), in section numbered six (6), in township number one (1) north, range thirty-six (36) W. of the 6th P. M., in Dundy county, Nebraska, being also known as the southwest quarter (S. W. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$), of said section number six (6), and said defendant ever since the 3d day of June, 1908, has unlawfully kept and still keeps the plaintiff out of the possession thereof." The second cause of action is for rents and profits, and need not be here set out. The defendant answered: (1) A general denial of all unadmitted allegations of the petitions. (2) It is alleged that neither plaintiff nor his grantors, etc., were seized or possessed of any part of said southwest quarter of the northwest quarter of said section 6, within 10 years immediately preceding the commencement of the suit; that the plaintiff's cause of action, if any he ever had, accrued on the 25th day of April, 1898, which was more than 10 years prior to the commencement of this action. (3) That on or about the 22d day of March, 1893, defendant entered into possession of the premises, to wit, the said southwest quarter of the northwest quarter of said section 6, under claim and color of title, and has since retained the actual, adverse and exclusive possession of the premises, at all times claiming to be the owner thereof; that plaintiff with knowledge of the facts has since the 25th day of April, 1898, up to the time of the commencement of the action stood by and permitted defendant to cultivate and make permanent improvements upon said land, and that he is estopped thereby to make any claim therefor; that the boundary line between plaintiff and defendant has been agreed upon between them and recognized by both for more than 10 years immediately preceding the commencement of the suit, and that during all of said time plaintiff has not claimed, asserted or demanded any right, title or interest in said premises, and during all of which time defendant has occupied the same, claimed and in good faith improved it, being, and believing himself to be, the owner thereof. The reply was a general

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denial. A jury trial was had, when the jury returned a general verdict in favor of defendant. A special finding was submitted and answer returned by the jury, the question and answer being as follows: "Does the jury find that from the 30th day of August, 1897, when the plaintiff received a receiver's receipt for lot numbered six (6), to the present time the defendant Anders Anderson, or some one in his behalf, has been in open, peaceable, exclusive and adverse possession of the land in dispute during all of said time, claiming to own the same? Answer: Yes." A motion for a new trial was filed, overruled, and judgment was rendered on the verdict in favor of defendant. Plaintiff appeals.

The case is a peculiar one, and, were it not for the plea of the statute of limitations, would be difficult of decision under the evidence submitted. There is no question of boundaries involved, nor as to the identity of the exact premises in dispute, for both petition and answer refer to them as the southwest quarter of the northwest quarter of section 6, township number 1 north, range number 36 west of the sixth P. M. Neither is there any dispute as to defendant's exclusive possession thereof since 1893. At some time, probably May 3, 1884, a duplicate receiver's receipt was issued to George W. Tompkins for the sum of \$200.70 in full payment for "lot 8, sec. 31, tp. 2 north, and lot 1, 2, 3, 4 and 5 quarter of section No. 6, in township No. 1 north of range No. 36 west, containing 160 acres." On the 6th day of May, 1884, Tompkins deeded it to J. M. Tolman (Tallman). On the 21st of April, 1888, a patent was issued to Tompkins. March 12, 1885, Tallman deeded to William J. Wilson. November 7, 1891, Wilson conveyed to Mads Anderson. March 22, 1893, the sheriff of Dundy county, by virtue of an execution sale against Mads Anderson, conveyed to defendant. In all those transfers the property is described as lots. Immediately after the execution of the sheriff's deed defendant went into possession of the land in dispute as his own and has held the possession ever since. Lot "6" is not referred to in any of

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those conveyances by that number. On the 3d day of June, 1908, the United States authorities issued to plaintiff what is styled "Timber culture certificate No. 1466," by which lots 6 and 7 in the same township and range were conveyed to him. At the close of the instrument this language is used: "This patent is issued in lieu of one bearing the same numbers, dated April 25, 1898, which has been canceled because of an error in the description." There is in this record a conveyance by quitclaim deed from plaintiff to the United States, releasing all claim to lot numbered 5, in the same township and range, and which bears date May 16, 1908. There is nothing in or about this deed giving any explanation as to why it was made, nor do we find anything in the evidence upon that subject. The inference would probably be that the original patent issued to plaintiff April 25, 1898, conveyed lot "5," and an error was thought to be discovered. This error, if one existed, was probably caused by the numbering of the original survey. The fact remains that now both plaintiff and defendant are claiming to be the owners of the tract of land occupied by the defendant, plaintiff claiming to own it by virtue of his patent of 1908, supplanting that of 1898, and defendant claiming it by and through the location of Tompkins in 1884, and the sheriff's deed to himself in 1893, and under which he is, and has been since said date, in the exclusive possession.

There is some evidence that the numbers of the lots appearing in the public records in the local land office, as well as in the office of commissioner of public lands and buildings, have been changed by erasure and substituting the numbers corresponding with plaintiff's claim, but it seems to be unknown when or by whom such changes were made. The evidence as to the original numbering of the lots is not convincing one way or the other, and we find ourselves unable to solve the question from the evidence. This uncertainty is, no doubt, largely owing to the long lapse of time since the survey and the report thereof. We are impressed with the belief that when Tompkins made

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his entry in 1884, and when defendant purchased the land in 1893, as well as when plaintiff made his entry in 1898, it was understood and believed that the number of the lot was as is now claimed by defendant. This number is also shown by the survey made in 1892 by the county surveyor, as shown by the record of that office of 1891-1892. The evidence shows without dispute the possession of defendant; that for a long period of time, longer than the statutory period of limitation, plaintiff has occupied adjacent land and knew of defendant's claim, at one time objecting to the fence of defendant being over the line and from which it was removed to on or near the true line. It is true, as contended by plaintiff, that the statute of limitations does not run against the general government; but, even if true that the title remained in the United States until the year 1898, there was yet more than 10 years intervening between that time and the commencement of this action, and by which the statutory bar was complete. This being true, we are persuaded that the verdict and judgment were the only ones that could have been rightfully rendered. If we are correct in this, the question of errors in the instructions does not require attention. *Jeffres v. Cashman*, 42 Neb. 594; *Henry v. Dussell*, 71 Neb. 691; *Kielbeck v. Chicago, B. & Q. R. Co.*, 70 Neb. 571; *Booknau v. Clark*, 58 Neb. 610.

As we have heretofore suggested, there is no question of boundaries, nor of any mistake in the particular land which defendant occupied and claimed to own. He occupied and openly claimed the land with the knowledge of plaintiff during the statutory period. The contention is that the land itself is not described by the correct numbers. Each party knew just what defendant claimed. His occupancy was exclusive, continuous. Eliminating the question of a mutual mistake, if there were one, his right could not be successfully assailed. But, if there were a mistake as to the correct description, his title would be good. *Baty v. Elrod*, 66 Neb. 735, 739, and cases cited. In that case the contention related to boundary lines, but it

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is not perceived that any different rule should be applied in a case like the one now under consideration. If the defendant had exclusive possession for the 10 years, claiming it as owner, his title would be perfect as against the whole world, except the sovereign, and those under disability. "It is the visible and adverse possession, with an intention to possess, that constitutes its adverse character." *Fitzgerald v. Brewster*, 31 Neb. 51.

The judgment of the district court is

AFFIRMED.

SEDGWICK and ROSE, JJ., dissent.

UNION STOCK YARDS NATIONAL BANK OF SOUTH OMAHA,
APPELLEE, v. MARY LAMB, APPELLANT.

FILED DECEMBER 18, 1912. No. 16,837.

1. **Bills and Notes: ACTION: DEFENSE OF COVERTURE: BURDEN OF PROOF.**
In an action on a promissory note, signed by a defendant, and it is not alleged in the petition that such defendant is a married woman, the fact that she is such, if relied upon as a defense, must be alleged in the answer, in which case the burden of proof is upon the defendant to establish the fact, and, if proved, the burden of proof is upon the plaintiff to prove that the contract was made by the defendant with reference to and for the purpose of binding her separate property and estate.
2. **Pleading: SUFFICIENCY OF PETITION.** If a cause of action is stated in the petition, the fact that the pleading contains allegations of redundant and unnecessary matter, which does not conflict with nor weaken the proper averments made, will not render the petition demurrable as not alleging facts sufficient to state a cause of action.
3. **Appeal: BILL OF EXCEPTIONS: AUTHENTICATION.** "The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions, when not authenticated as such by the certificate of the clerk of the trial court." *State Bank v. Bradstreet*, 89 Neb. 186.
4. **Instructions given and refused are examined, and no error discovered in the action of the court thereon.**

5. Appeal: SPECIAL FINDINGS: FAILURE TO REQUEST. If a litigant desires that special findings of fact be made and returned by a trial jury, he should request their submission.

APPEAL from the district court for Greeley county:
JAMES R. HANNA, JUDGE. *Affirmed.*

J. R. Swain, for appellant.

Parish & Martin and *John E. Kavanaugh*, contra.

REESE, C. J.

This is an action by plaintiff against Mary Lamb and M. Lamb to recover the balance due upon a promissory note executed by both defendants. It is alleged in the petition that the note sued upon is a renewal of a note previously given for the same indebtedness; the former note having been signed by both defendants. The fifth paragraph of the petition is as follows: "That on the 13th day of September, 1907, the defendant Mary Lamb executed and delivered to the plaintiff a chattel mortgage for the sum of \$4,119.92, and that said chattel mortgage was made at the same time as the note herein set out, and was made a part of the original contract between the plaintiff and the defendant, and the said chattel mortgage contained the following condition: 'It is expressly understood that this mortgage covers and secures all extensions or renewals of within described note or notes.' And said mortgage also contained the following condition: 'If for any cause said property shall fail to satisfy said note, debt, interest, costs and charges, I covenant and agree to pay the deficiency.'" It is alleged in the sixth paragraph of the petition that the consideration named in the notes and mortgage was extended to the defendant Mary Lamb, and the entire contract whereby she became indebted to the plaintiff was made with the defendant Mary Lamb, whereby she pledged her separate property for the faithful performance of the obligation named in said notes and mortgage.

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Defendant M. Lamb filed no answer. Mary Lamb answered (1) by a general denial of the unadmitted averments of the petition; (2) admitted the signing of the note upon which the action was based, but alleged that "she is a married woman, the wife of M. Lamb, the defendant in this case, and was such at all times mentioned in said petition, and a resident of the state of Nebraska; that she never signed said note mentioned in paragraph two of plaintiff's petition or any agreement connected therewith with reference to her separate property, estate or business, nor with a view of binding her separate property, estate or business, but signed said note solely as surety for said M. Lamb, and for no other purpose;" (3) avers that she never received any consideration for said note, other than the fact that she signed it as surety, and that she never had any business dealings with plaintiff, and was not indebted to it in any sum, and signed said note at its request as surety only. The reply was, in substance, a general denial. A jury trial was had.

It is suggested in the transcript that, at the commencement of the introduction of evidence, the defendant Mary Lamb objected to the introduction of any evidence, for the reason that the petition did not contain facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant Mary Lamb. The objection appears to have been overruled and exception taken, and the ruling is presented in this court for error. The contention seems to be that it is shown by the paragraphs in the petition, herein above referred to, that the action is against Mary Lamb as a married woman, and, that being the case, the petition is deficient for want of an allegation that she signed the note upon the faith of her separate estate, which she then had and continued to have at the time of filing the petition. A number of cases are cited in the brief sustaining this view, and the law is probably as contended for, if in a proper case; but we fail to see that it can be applied to this case. There is no averment in the petition that Mary Lamb is, or was, a married woman. We are

unable to see the necessity for the averments in the petition, above quoted and set out, since they fall short of making the allegation of coverture. It may have been the object of the pleader to plead his evidence, which, although violative of the rules of pleading, would not furnish a basis for a demurrer. It did not detract from the cause of action stated. It may have been the purpose to anticipate a possible defense of suretyship, which would be improper, but would not render the pleadings demurrable as not stating a cause of action, if one was otherwise stated. We therefore conclude that the court did not err in overruling the demurrer *ore tenus*. Where the petition does not allege coverture, the fact that the defendant is a married woman is matter to be set up in defense, and in such case it is for a defendant to sustain the defense by proper evidence. If she establishes coverture, the burden is on the plaintiff to prove that the contract was made with reference to and upon the credit of her property. *Citizens State Bank v. Smout*, 62 Neb. 223.

It is shown by the transcript that upon trial to the jury a general verdict was returned finding in favor of plaintiff and against Mary Lamb, and assessing the amount of plaintiff's recovery at \$1,257.03. A motion for a new trial was filed, overruled, and judgment rendered on the verdict. Defendant appeals.

It is insisted that the verdict is not sustained by the evidence, and the bill of exceptions is referred to as sustaining the contention, but there is no certificate of the clerk that the papers said to contain the evidence is the bill of exceptions, either the original or a copy, and we are debarred from this investigation. It has been so often decided by this court that the certificate of the clerk is jurisdictional, and what purports to be the bill of exceptions must be ignored if not certified, that it would seem to be unnecessary to cite cases, but a small number will be here appended. *Scott v. Spencer*, 42 Neb. 632; *Yenncy v. Central City Bank*, 44 Neb. 402; *Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb. 198; *Reuther v. Zimble-*

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man, 50 Neb. 165; *Bryant v. Cunningham*, 52 Neb. 717; *Coy v. Miller*, 54 Neb. 499; *Noble v. Neal*, 57 Neb. 797; *State Bank v. Bradstreet*, 89 Neb. 186. This must also apply to the contention that the court erred in excluding testimony offered by defendant, as we have no authority to examine, for any purpose, what purports to be a bill of exceptions.

Of the instructions, those numbered 12 and 13 are objected to. Instruction numbered 12 told the jury, in substance, that the material question to be decided was: "Did the parties, at the time the note in suit was executed, contract with reference to, and upon the faith and credit of, the separate estate of the defendant Mary Lamb?" etc. The criticism is as to the use of the word "parties." It is claimed that this included only the plaintiff and did not include the defendant. We think this is too narrow a construction of the language. It evidently referred to the parties to the contract and suit, which would include all. But, were it true that the instruction was indefinite, in the matter of which complaint is made, the thirteenth instruction tells the jury that, in order to hold Mary Lamb liable on the note, they must find she executed it "with reference to, and upon the faith and credit of, her separate property and estate." This removed all doubt, if any existed. The same idea is given in another form in the fourteenth instruction.

Defendant requested the court to give the following instruction: "The jury are instructed that the defendant in this case is not bound by any act of her husband. Michael Lamb, as her agent, unless you find from the testimony that he had authority from her to so act." What the testimony was is not before us, and, before the judgment could be reversed for the refusal to give an instruction, the instruction asked must have been applicable to any state of facts provable under the pleadings. It must be conceded that, if a person assumes to act as the agent for another, the principal will be bound by the agent's acts if authority was given, or if the principal subsequently

ratified an unauthorized act. We are unable to say whether there was any evidence that the husband acted as agent, or whether if he did so act, even without authority, his act was ratified by defendant. In either case there would be no error in refusing to give the instruction.

The final contention is that "the verdict and judgment in this case are of no force, for the reason that there is no finding in the verdict that the defendant Mary Lamb had a separate estate at the time the contract was entered into, or, if so, that any such was in existence at the time the verdict was rendered; nor does the judgment recite that the same is against the separate estate and property of the defendant Mary Lamb, or that she had a separate estate, either at the time the contract was entered into, or at the time the judgment was rendered; nor does it recite that execution should issue against the separate property of Mary Lamb for the satisfaction thereof." A number of cases are cited as supporting this contention; but we think they are not authority here when considered in the light of the statute of this state. In short, we do not think any of these elements are essential to be found in order to the validity of either the verdict or judgment. Had the defendant desired that the jury should pass on the questions suggested, the submission of special findings under the provisions of sections 292 and 293 of the code would probably have been in order. Instead of this, she submitted her case to the jury calling for a general verdict. The judgment is in accordance with the requirements of section 292 of the code, and that must be held sufficient.

We are unable to find any reversible error in the record before us. The judgment will therefore have to be affirmed, which is done.

AFFIRMED.

M. K. GOETZ BREWING COMPANY, APPELLEE, v. FRANK M. WALN, APPELLANT.

FILED DECEMBER 18, 1912. No. 16,854.

1. **Courts: RULE TO INFERIOR TRIBUNALS: APPEAL: AMENDMENT OF RECORD.** "The district court may, by rule, compel an inferior court or board to allow an appeal, or to make or amend records according to law, either by correcting an evident mistake or supplying an evident omission." Comp. St. 1911, ch. 19, sec. 28.
2. **Appeal: CORRECTION OF TRANSCRIPT.** Where an appeal from a judgment of the county court is taken within the time required by law, the transcript being filed in the district court, but the county judge failed to attach his certificate thereto, the district court may by order direct the transcript to be returned to the county judge for proper certification.
3. ———: ———: **NEGLECT OF COUNTY JUDGE.** In such case the failure of the county judge to return the transcript duly certified within the time allowed by law for taking the appeal will not deprive the district court of jurisdiction over the cause.
4. ———: ———: **NUNC PRO TUNC ENTRY.** Where, upon the return to the district court of the transcript duly certified, it is discovered that at the close of the trial the county judge announced the judgment to be that the plaintiff's action was dismissed and judgment rendered in favor of defendant against the plaintiff for the costs, but that in entering the judgment the order dismissing the case was inadvertently omitted from the record, and that fact is established to the satisfaction of the district court, it is within the power of that court to again return the transcript in order that a *nunc pro tunc* entry may be made according to the fact. While the proceeding was probably irregular, the district court was not deprived of jurisdiction thereby.
5. **Novation: REQUISITES.** In order to constitute a novation, by which the original debtor is released, the creditor being bound thereby to discharge the debt as to him and look to another for the payment of his demand, it must appear that there was a legal and enforceable contract made between the new debtor and the creditor by which the claim could be enforced against such new debtor, and that the creditor unconditionally released the original debtor and accepted the third person in his stead.
6. **Appeal: VERDICT: INSTRUCTIONS.** Where the verdict and judgment are the only ones which could be legally returned and entered according to the evidence, the instructions of the court to the jury will not be examined.

APPEAL from the district court for Gosper county:
ROBERT C. ORR, JUDGE. *Affirmed.*

O. E. Bozarth and W. S. Morlan, for appellant.

G. Norberg and Lambe & Butler, contra.

REESE, C. J.

This action was commenced in the county court of Gosper county for the purpose of collecting the amount alleged to be due on certain promissory notes executed by defendant to plaintiff. The execution and delivery of the notes being admitted by defendant, both in his answer and testimony, they need not be further described here. Plaintiff failed to obtain judgment in the county court, and sought to appeal to the district court. The county judge prepared a transcript of the proceedings, and the same was filed in the office of the clerk of the district court within the time allowed by law for taking appeals, but the county judge failed to certify to the same. Upon the discovery of this omission the district court, on motion of plaintiff, and over the objection and exception of defendant, directed the transcript to be remanded to the county judge for proper certification. The transcript was returned to the district court duly certified, but the time for appealing had expired. Defendant then objected to the filing of the amended transcript. The objection was overruled, to which he excepted. It was then discovered that the transcript did not contain a formal judgment dismissing plaintiff's action, and, upon the application of plaintiff, and over the objection and exception of defendant, the transcript was again returned to the county court for the entry of a *nunc pro tunc* order and judgment in order to conform to the fact. The *nunc pro tunc* entry was made, the judge certifying that at the close of the trial he did announce and render judgment dismissing the suit, but had neglected to so record the fact in his docket.

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The cause was then held for trial in the district court over the objection of defendant; the claim being that the district court had no jurisdiction, and that the appeal was not perfected within the time required by law. To say that the county judge was guilty of inexcusable gross carelessness in the whole matter, from which much annoyance, expense and delay resulted, would be but a mild reflection upon his conduct. It is now contended that the district court never acquired jurisdiction over the case, owing to the failure of the county judge to present a "certified transcript" as is required by section 1008 of the code. It is apparent from this record that the failure of the county judge to certify to the transcript was not the fault of plaintiff, and it is the well-settled law of this state that a party cannot be deprived of his appeal by the wrong of the officer, when he is without fault himself. In making the order for the proper certification of the transcript, the court was well within the power conferred by section 28, ch. 19, Comp. St. 1911, which provides: "The district court may, by rule, compel an inferior court or board to allow an appeal, or to make or amend records according to law, either by correcting an evident mistake or supplying an evident omission."

In defendant's answer filed in the county court, he admitted "the execution and delivery of said notes as set out in said petition," of which there were five, amounting on their face to \$700, but upon which there were certain credits allowed, amounting to \$132.35. The transcript as originally made shows, among other things, the following as occurring at the trial: The five promissory notes were introduced in evidence and were objected to "for the reason the notes have not proper and sufficient verification. Objection sustained by the court, and defendant rests case. It is therefore considered by me that the defendant have judgment against the plaintiff in this action in the sum of \$8.90 his costs." This entry is under date of February 12, 1907. A showing was made to the district court that this entry was not in accordance with

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the facts, in that the proper judgment was announced from the bench dismissing the suit, whereupon the court ordered that the transcript be referred back for a proper certification as to the fact. The county judge's transcript, under date of November 9, 1907, shows a motion was made by plaintiff to correct the record "by entering judgment in said action according to the facts *nunc pro tunc* as of February 12, 1907." It is recited that due notice of the hearing of the motion was given, and that the hearing was adjourned to November 23, when the parties appeared, and defendant filed a special appearance to object to the jurisdiction of the court, which, "after full argument by attorneys upon both sides," was overruled, and the court "finds of his own knowledge" that the judgment was that the action be dismissed, as announced at the completion of the trial, but that, in making up the record, it was inadvertently omitted. The judgment is then rendered in proper legal form. This is dated November 30, 1907, and was probably filed in the office of the clerk of the district court, as it is contained in the rambling and imperfect record presented here. Objections to that record were presented to the district court and overruled, when pleadings were filed, and the cause tried to a jury on the merits on the 25th day of January, 1910. Less attention should have been given to this subject by us, were it not for the fact that it is discussed extensively in the briefs.

The amended petition filed in the district court is in the usual form for declaring upon promissory notes. The answer thereto is of considerable length, but can be fairly summarized to be that plaintiff, to induce defendant to handle its beer at Swanton, in Saline county, advanced the money necessary to procure a liquor license for the year 1904, and for which the notes were given, and defendant entered upon the business at said place; that, on account of the inferior quality of the beer furnished by plaintiff, the saloon business was not a success, but a failure, by reason of which defendant was caused to lose \$1,000; that defendant sold his saloon to one Mitlewski, by the consent

and approval of plaintiff, Mitlewski to assume said indebtedness of defendant; that plaintiff accepted Mitlewski therefor, agreeing to look to him alone for the payment thereof and cancel and surrender the notes of defendant; that, under the contract and agreement of the parties, Mitlewski took charge of said saloon, became indebted to plaintiff for the amount of said notes, and defendant was discharged from all indebtedness to plaintiff. It is further alleged that, during the time defendant was held liable on the notes, he executed a bill of sale to plaintiff upon the saloon fixtures, of the value of \$350, which property was appropriated by plaintiff to its use, and for which he claims credit, if held liable to plaintiff on the notes. Judging by the verdict, this claim was allowed by the jury, though for a less amount, and the matter need not be further noticed. The contention is made in the answer that the court was without jurisdiction, owing to the irregularities above referred to, but, as we view the case, this is without merit. The reply was a general denial. The jury returned a verdict in favor of plaintiff for \$523, on which judgment was rendered; the motion for a new trial being overruled. Defendant appeals.

The controlling question in the case is as to the defense of novation alleged in the answer. The evidence, including the testimony of defendant, shows, without dispute or conflict, that the money represented by the notes was loaned defendant by plaintiff about the time defendant went into business at Swanton. The alleged agreement to release defendant from the payment of the notes is denied by both plaintiff's managing officer and Mitlewski, but we look to the testimony of defendant for the purpose of ascertaining whether there was any competent evidence that the novation was made by which plaintiff agreed to release defendant and look to Mitlewski as its debtor. We do not think his own testimony was sufficient to prove, or tended to prove, that such an agreement was made. It is shown that Parker, plaintiff's agent, with whom all agreements were made, died before the trial, and

his version of the matter could not be had. It is stated by defendant that the whole of the agreements with Mitlewski and with Parker were oral, no writings having been drawn. Defendant was asked as to what arrangement he had made with Parker in regard to the saloon business. His answer, referring to the transaction with Mitlewski, was: "About that time Parker came to my place and he asked me in regard to what kind of a man this Mitlewski was, and I told him I considered him an all-right man. 'Well,' he says, 'I will see that the Goetz people accepts of him then.' The deal had been made the Saturday night before, providing the Goetz people would accept of him. After the 1st of September I wrote the Goetz people, and they said they would notify Mr. Parker." He presented a letter from plaintiff company dated September 24, 1904, written to him, which says: "Noting your kind favor of the 22d inst., our salesman, Mr. W. H. Parker, informed us of the arrangement made between you and Mr. Fred Mitlewski, which is, in our opinion, entirely satisfactory, and we hope the two notes past due will be paid in the time mentioned in your letter. Thanking you for past favors, and hoping that we may be able to have business dealings together in the future, we remain, Very truly yours, M. K. Goetz Brewing Company, per M. K. G." Defendant was also asked what Parker said to him and what he said to Parker. His answer was: "He asked me what kind of a man Mitlewski was, and I gave him a good recommendation, and told him Mitlewski was to take up my notes and assume all indebtedness. * * * I told him I had sold to Mitlewski provided Goetz Company would accept of the deal. He said it was all right, and that Mitlewski was to take up my notes and enter into a new contract and take up the indebtedness with the Goetz people;" that he then turned the business over to Mitlewski and he had nothing further to do with the business after that. On cross-examination he stated that Mitlewski had been in his employ; that he could not say if Mitlewski had any property, and had never represented

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to Parker that he had; that Mitlewski never signed any agreement to pay defendant's debts, but that he did agree to do so with Parker and the witness; that the agreement with Parker was that defendant was to be discharged from liability on the notes; that he never demanded nor received the notes; that he did not know if the business was continued in his name, nor did he know if the funds of the saloon were deposited and checked out in his name. He testified that it was supposed that the business would yield sufficient to pay the notes, but that no arrangement was made for meeting any deficiency resulting from a failure in that regard, and no agreement as to who should pay it. On re-examination he was asked to state what he said to Mr. Parker in regard to Mitlewski paying the notes. His answer was: "I told him that Mitlewski was to take the place and pay off the indebtedness and all the notes against me, and to draw up a new contract with Mitlewski. Q. What did he say to that? A. Parker said it was all right." This is all the evidence adduced by defendant in support of the averment of his answer.

It is elementary that, in a case of this kind, there can be no novation unless the party whom it is asserted assumed and agreed to pay the debt became unconditionally bound to the creditor to pay the debt of the original debtor. There must also be the contract of the creditor, made with the new debtor, to accept him as his debtor. If Mitlewski agreed with defendant that he would become obligated to the creditor, but entered into no contract with the creditor by which he became the debtor of the creditor so that the creditor might have maintained an action against him, there could be no novation, and the original debtor would not be released. In *Izzo v. Ludington*, 79 N. Y. Supp. 744, it is said: "Neither do I think that the facts proved with respect to these orders constitute a novation. That requires the creation of new contractual relations, as well as the extinguishment of old. There must be the consent of all the parties to the substitution, resulting in the extinction of the old obligation,

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and the creation of a valid new one (citing authorities). There is no proof here of any consent by McMahon & Wells or the brewing company to release Izzo (the original debtor), and to look to the defendant for their pay, nor of any valid agreement on the latter's part making him liable to them, and therefore the doctrine of novation does not apply." See, also, *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276; 29 Cyc. 1130; 1 Parsons, Contracts (9th ed.) *217; Clark, Contracts, sec. 260.

We are unable to find any evidence that Mitlewski became indebted to plaintiff, or that plaintiff accepted him as its debtor. This being true, defendant remained liable to plaintiff for the debt evidenced by the notes, and the verdict of the jury and the judgment thereon were the only verdict and judgment warranted by the pleadings and evidence. This renders it unnecessary for us to examine the instructions either given or refused. *Kielbeck v. Chicago, B. & Q. R. Co.*, 70 Neb. 571.

The judgment of the district court is

AFFIRMED.

CHARLES E. LEAR, APPELLEE, V. WILLY FICKWEILER,
APPELLANT.

FILED DECEMBER 18, 1912. No. 16,870.

Mortgages: FORECLOSURE: NAMES. Where one takes title to real estate by his initial letters as his first name, subject to a mortgage then existing, the mortgage may be foreclosed and notice given him by publication by such name.

APPEAL from the district court for Keya Paha county:
WILLIAM H. WESTOVER, JUDGE. *Reversed.*

M. F. Harrington, for appellant.

Lear & Lear, contra.

. REESE, C. J.

This is an action in ejectment, which was commenced on the 5th day of February, 1910, and in which plaintiff claims the possession of the northeast quarter of the southeast quarter of section 23, and the west half of the southwest quarter and the southwest quarter of the northwest quarter of section 24, all in township 34 north, of range 17 west, in Keya Paha county. Aside from certain averments in the petition, in which it is alleged that a mistake in the description of the land in one of the deeds constituting the chain of title is sought to be corrected by a reformation of the deed, it is alleged that plaintiff is the owner and entitled to the possession of the land; that on or about the 10th day of December, 1901, the defendant took forcible and unlawful possession of the land, and has held such possession without right ever since. Judgment for possession and an accounting of rents and profits is demanded.

The defendant's answer consists of a general denial and the averments that on the 9th day of April, 1889, he was the owner of the fee title to said land, when he executed a mortgage and note to the Nebraska Mortgage & Investment Company to secure the sum of \$400, bearing interest at the rate of 7 per cent. per annum before maturity, and 10 per cent. thereafter; that, for value, the mortgage and note thereby secured were sold and transferred to W. C. Brown; that on the 19th day of June, 1900, the said Brown commenced suit to foreclose said mortgage, making P. H. Bender, the then holder of the legal title, and Mrs. P. H. Bender, who were then nonresidents, parties defendant, the service being had by publication; that a decree of foreclosure was rendered September 10, 1900, finding the amount due the plaintiff in said action to be \$668.48, and ordering the land to be sold to pay the same; that an order of sale was issued, the land sold by the sheriff to William C. Brown for the sum of \$668.48, and a sheriff's deed was issued to the purchaser, which

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deed was duly recorded; that thereafter Brown sold and conveyed the premises to defendant, and, under his said purchase, defendant took possession of the land in the year 1901, and has held such possession since said time, the possession being open, peaceable and exclusive. It is conceded in the answer that, by reason of the action to foreclose the mortgage having been brought against "P. H. Bender," instead of against him by his full name, the foreclosure was invalid; but alleges that by his purchase Brown retained his mortgage lien, and by his deed to defendant he transferred the same to defendant; that Bender abandoned the land, paying no taxes thereon, and defendant's possession was that of mortgagee in possession, which tolled the statute of limitations; that he has paid the taxes thereon since 1896, and that before plaintiff can succeed in this suit he must pay the amount due on the mortgage, as well as the taxes paid by defendant, with interest thereon.

The reply consists of a general denial of all unadmitted averments in the answer; admits the execution of the note and mortgage, and their transfer to Brown; that Philip H. Bender became the owner of the property in controversy, subject to the mortgage; that Brown procured the foreclosure as alleged, but that the mortgage was barred by the statute of limitations; that defendant received the conveyance from Brown and took possession of the land by virtue thereof. There is a special denial of anything being due defendant, or that he is in possession as a mortgagee. This being covered by the general denial need not be further noticed. A trial was had to the district court, without a jury, and which resulted in a finding and judgment in favor of plaintiff. Defendant appeals.

It is seldom that an appellate court is called upon to hold counter to the conclusion of the trial court and the counsel upon both sides of the case, but we seem to be compelled to do so in this case. It is made clear by the pleadings that at the time of the foreclosure of the mortgage Bender was the holder of the title to the land, sub-

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ject to the mortgage, and that in the deed by which he held title he is named as P. H. Bender. In *Stratton v. McDermott*, 89 Neb. 622, *Clark v. Hannafeldt*, 91 Neb. 504, and *Butler v. Farmland Mortgage & Debenture Co.*, p. 659, *post*, we held and decided that where a person accepts and holds title to real estate, being described and referred to in that way, and so records his deed, it is equivalent to a representation that that is his name, and notice by publication may be rightfully given by such name. This cause was tried, appealed, and the brief of appellant filed before those decisions were made, and it is no surprise that neither the court nor counsel adopted that view. Following those decisions, we must hold that the foreclosure was valid, and that, by his purchase from Brown, defendant became the owner, and plaintiff's action cannot be maintained.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED.

S. HIRSCH DISTILLING COMPANY, APPELLANT, v. JOHN J. ROACH, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,899.

1. **Sales: ACTION: BURDEN OF PROOF.** In an action on account for goods sold and delivered, where the purchase and receipt of the goods are denied, the burden is on the plaintiff to prove such sale to the defendant.
2. ———: ———: **QUESTION FOR JURY.** Where the proof is that the goods were sold to one in charge of a saloon formerly occupied by defendant, and in which the defendant's license was posted up, that the order was signed by the person in charge, not as agent or manager, but in his own name, that the goods were ordered to be shipped to defendant, the order being given without defendant's knowledge or consent, and it is also shown that plaintiff afterward filed a claim for the account in the county court against the estate of the person who gave the order, a question of fact

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is presented for the decision of the jury as to the person to whom the goods were sold.

3. ———: ———: EVIDENCE. That plaintiff had filed the claim against the estate of the person making the order for the goods is a circumstance tending to show that the goods were sold to such person.

APPEAL from the district court for Merrick county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

William Simeral and I. J. Dunn, for appellant.

Martin & Bockes, contra.

REESE, C. J.

This action was commenced in the county court of Merrick county, and was on an account of liquors alleged to have been sold by plaintiff to defendant, a licensed saloon-keeper in the city of Grand Island, and delivered at various times during the months of July, September and December, 1908; the bill amounting to the sum of \$348.14. The answer of defendant consisted of (1) a general denial of all unadmitted allegations of the petition; (2) admitted that he was a licensed saloon-keeper in Grand Island during the year 1908; (3) a special denial that plaintiff sold him any portion of the liquors for which the suit was brought; (4) alleged that, notwithstanding he had procured the license as aforesaid, on the 18th day of July, 1908, he ceased to engage in business in Grand Island, and removed to the city of Kearney, and has never since said date been engaged in business in Grand Island. The fifth paragraph of the answer need not be here noticed, except that it is alleged that the liquors, if sold as alleged, were sold to G. A. Mann, who was then engaged in the saloon business in Grand Island. The reply was a general denial, with an averment that no defense was stated in the answer, and an allegation that plaintiff had no knowledge or information at the time of the sale that defendant claimed to have sold his

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saloon, or that Mann, in charge thereof, was not his agent with authority to purchase, and that plaintiff dealt with Mann as the agent of defendant. After a trial and judgment in the county court, the case was appealed to the district court, where, by stipulation, the pleadings in the county court were made the pleadings in the district court. A jury trial was had, which resulted in a verdict in favor of defendant, and upon which judgment was rendered; the motion for a new trial being overruled. Plaintiff appeals to this court.

The principal question presented by the brief of appellant is one of fact as to whether Mann should be held to be the agent of defendant in the purchase of the goods described in the account. It is shown that Mr. Mann is deceased, and therefore his testimony could not be had. So far as the contention in this case is concerned, it may be said that the goods, as charged in the bill, were sold and delivered to some one; plaintiff alleges to defendant; defendant denies the purchase. Plaintiff's salesman testified that on the 21st of July, 1908, he went to the place of business in Grand Island, which defendant had, and, so far as the salesman then knew, still occupied as a saloon, and inquired for defendant, but was informed by Mr. Mann, in charge, that defendant was out of town. Upon being asked if any goods were wanted, Mann stated that he could use some, and gave the order, signing his own name thereto. The order was headed, "Send to J. J. Roach, Grand Island," but whether this was by the direction of Mann we are not informed. Defendant testified that he ceased to do business in Grand Island about the 18th of the same month; that he was succeeded in business by G. A. Mann; that he removed to Kearney, and shipped his stock of liquors to that place, and did not authorize any other person to order liquors to be shipped to him there after that date. It appears that his city liquor license was permitted to remain posted upon the wall of the saloon, and which was observed by plaintiff's agent. There is no evidence of any inquiry having been made by

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plaintiff's agent, nor any statements made by Mann, concerning defendant, except as above stated. The liquors were not paid for, and Mann, who it appears resided in Hastings, died. During the administration of his estate in the county court of Adams county, plaintiff filed a claim against his estate for the identical goods sued for in this case. Whether the bill was ever allowed against the Mann estate is not disclosed by the record before us. The proof of the filing of the claim is by the certificate of the county judge of Adams county, and the filing is not pleaded as payment, or estoppel, and, as we understand, was offered as a circumstance, for the consideration of the jury, tending to prove that plaintiff did not consider or understand that the sale was to defendant, but to Mr. Mann. For this purpose it was competent, relevant and material, and subject to such inferences and weight as the jury might think it entitled to. There was no explanation given for plaintiff's action in filing the claim, no contention that plaintiff understood Mann and defendant to be in partnership, nor other reason for filing the claim than that the goods were sold to Mann. This with all the other evidence in the case was for the consideration of the jury. There was no evidence that Mann was ever the agent of defendant, that he ever assumed to act as such unless in giving the order, or that defendant ever held him out as such, by word or act, unless leaving his license posted in the saloon amounted to such; but, on the contrary, the filing of the claim by the leading officer of plaintiff was to say, in effect, that the goods were sold to Mann, and to no other person. For those reasons, the case of *Moise v. Weymuller*, 78 Neb. 266, is not in point.

It is claimed in plaintiff's brief that the certified copy of the claim against the Mann estate was not properly authenticated. This objection, however, was not presented when the evidence was offered; the objection being "incompetent, irrelevant, immaterial, not a proper defense, and not set up as a defense in the answer." Had the want of proper authentication been presented, it is quite probable that the objection would have been sustained.

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We are unable to see that there has been a miscarriage of justice, and the judgment of the district court will have to be affirmed, which is done.

AFFIRMED.

STATE, EX REL. JAMES CONKLING ET AL., APPELLANTS, V.
JOHN A. KELSO ET AL., APPELLEES.

FILED DECEMBER 18, 1912. No. 17,600.

1. **Constitutional Law: SPECIAL LEGISLATION: ACT FOR REMOVAL OF COUNTY SEATS.** An act of the legislature, upon the subject of the relocation of county seats, which provides that no county seat shall be relocated, except upon a majority vote of three-fourths of the electors, in any case where the county seat has been located and retained for a period of ten successive years, "prior to the passage and approval of this act," in any one place, is void under the provisions of section 15, art. III, of the constitution of this state, as local and special legislation.
2. ———: ———: ———. A classification which limits its provisions to a certain class then in existence, excluding all others from ever entering such class by growth, development, or other cause, when applied to the relocation of county seats, is equivalent to the naming of the county seats within the class, and is thereby rendered local and special legislation. *State v. Scott*, 70 Neb. 685, followed.

APPEAL from the district court for Franklin county:
HARRY S. DUNGAN, JUDGE. *Reversed.*

C. C. Flansburg, for appellants.

George J. Marshall, *contra*.

REESE, C. J.

This was an application to the district court for Franklin county for a writ of mandamus to the county board of said county directing it to call a second election for the removal of the county seat. It was alleged in the writ, in

addition to the allegation of relators' capacity to maintain such an action, that Franklin county is under township organization, and respondents are members of the county board; that the village of Bloomington is, and has been for more than 25 years last past, the county seat of said county; that on the 8th day of July, 1911, a petition was filed, signed by more than three-fourths of all the electors of the county, as shown by the preceding general election, praying the board to call a special election for the relocation of the county seat; that the petition was found by the board to be sufficient, when it ordered that an election be held on the 29th day of August of that year; that due notice was given, and the election held, at which 2,251 votes were cast; that, of the votes cast, the village of Macon received 713, the city of Franklin 813, the village of Bloomington 670, the village of Upland 27, the village of Naponee 5, the village of Riverton 13, the village of Hildreth 5, the village of Campbell 1, the center of the county 3, and Ash Grove 1, all thereof being in the county of Franklin; that the votes were duly canvassed and found to be as above stated; that upon the same being reported to the board, and it appearing therefrom that more than three-fifths of all the votes cast had been in favor of places other than Bloomington, the then county seat, the relators demanded that said board immediately call a special election upon said question, but the request was denied, and the board refused to call the same. The prayer was for a mandamus compelling the board to call the desired election. The respondents demurred to the writ. The demurrer was sustained. Relators stood upon the writ, when the cause was dismissed. Relators appeal.

The controlling question in this case is as to the validity of an act of the legislature of 1905 (laws 1905, ch. 42), entitled "An act to amend section 4410 of Cobbey's Annotated Statutes of Nebraska for 1903, and repealing said original section." The act amended is contained in laws 1875, p. 159, and is carried forward into Ann. St. 1903 as sections 4410 to 4418, inclusive. It is not deemed neces-

sary to set out the act of 1875 in full. The substance of the act is to the effect that the county seat of any county may be relocated by a vote of three-fifths of the electors at an election called and held for the purpose of voting thereon, and that upon a petition of three-fifths of the electors to the county board it shall be the duty of the board to call such election; that, if no place receives three-fifths of the votes cast, another election shall be called and the question resubmitted, and, if any place receives three-fifths of the votes cast, such place shall be the county seat, except that, if the then county seat shall receive more than two-fifths of the votes at either of the elections, no further election shall then be called on the petition presented, and the county seat shall remain at its then place for at least two years, during which time no election shall be called upon that question.

The act of 1905 (laws 1905, ch. 42, Ann. St. 1911, sec. 4410) is as follows: "Whenever the inhabitants of any county are desirous of changing their county seat, and upon petitions therefor being presented to the county commissioners, signed by resident electors of said county, equal in number to three-fifths of all the votes cast in said county at the last general election held therein, and containing in addition to the names of the petitioners, the section, township, and range on which, or town or city in which the petitioners reside, with their age and time of residence in the county, it shall be the duty of such board of commissioners to forthwith call a special election in said county for the purpose of submitting to the qualified electors thereof the question of the relocation of the county seat. Provided, that in case any county seat has been located and retained for a period of ten successive years, prior to the passage and approval of this act, in any one place, the said place shall become and remain the permanent county seat of such county, unless such petition be signed by such electors equal in number to three-fourths of all the votes cast in said county at the last general election held therein. Notice of the time and place of

holding said election shall be given in the same manner, and said election shall be conducted in all respects the same as is provided by law relating to general elections for county purposes. The electors at said election shall designate on their ballots which city, town or place they desire said county seat located at or in, and any place receiving three-fifths of all the votes cast shall become and remain, from and after the first day of the third month next succeeding such election, the county seat of said county; provided, that in case any county seat has been located and retained for a period of ten successive years, prior to the passage and approval of this act, in any one place, it shall not be removed unless some other place shall receive three-fourths of all the votes cast at said special election." This act is practically a copy of the original section (laws 1875, p. 159, sec. 1; Ann. St. 1903, sec. 4410), but with the provisos added. By the first proviso, if the county seat has existed at any one place for ten successive years prior to the passage of the act, the petition asking a submission of the question must be signed by three-fourths, instead of three-fifths, of the electors. By the second proviso, if the county seat has remained in the same place for ten years prior to the passage of the act, another place must receive three-fourths of all the votes cast at the election, or no removal will result.

It is contended by relators that both of these provisos are violative of section 15, art. III of the constitution, and void, as local and special legislation. That section provides: "The legislature shall not pass local or special laws in any of the following cases; that is to say: * * * Locating or changing county seats." The vice of the act above quoted, if any, is found in the clause limiting the provisions to county seats which have been located for ten successive years "prior to the passage and approval" of the act. There can be no just objection to the classification of county seats, if such classification is general and could be applied to all counties in the state, should the county seat remain unchanged for a specified number

of years. This principle is recognized in *State v. Berka*, 20 Neb. 375; *Van Horn v. State*, 46 Neb. 62; *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200; *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1; *State v. Frank*, 60 Neb. 327, 61 Neb. 679; *State v. Stuht*, 52 Neb. 209. But in *State v. Scott*, 70 Neb. 685, a different rule is applied where the limitation closes the door to any further admission to the class, and the act is held to be the equivalent of naming the county seats to which the proviso is to be applied, and can never apply to any others, and to that extent it is both local and special legislation. We have examined the cases cited in *State v. Scott*, *supra*, and they support the holding in that case, and in addition we cite *Nichols v. Walter*, 37 Minn. 264; *Codlin v. County Commissioners*, 9 N. M. 565; 15 Am. & Eng. Ann. Cases, 856 *et seq.* The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special, and a violation of the clause of the constitution above quoted. It follows that the limitation in the act to all county seats which had existed for ten successive years at the time of the passage of the act, and not permitting the rule to be applied to other counties, is equivalent to the naming of the county seats of that class, and is therefore void. This being true, we are compelled to accept the law as it existed in the act of 1875 unchanged. There is no doubt but that the spirit of the law of 1905, could it be enforced, is salutary and desirable, and the attention of the legislature is called to the benefits to be derived from such an act, but with those words of limitation omitted. Whether a change of the county seat can be legally effected by an effort to follow the involved and complicated provisions of the act of 1875 is not now before us, and is not decided. The question may never arise.

Providence Jewelry Co. v. Gray Mercantile Co.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

PROVIDENCE JEWELRY COMPANY, APPELLANT, v. GRAY
MERCANTILE COMPANY, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,881.

1. Appeal: FINDINGS. Where an action at law is tried in the district court without a jury, findings of fact have the same force as a verdict.
2. Parol Evidence: SALES BY SAMPLE. Oral warranties made by an agent or traveling salesman, that the goods sold would be equal to the samples exhibited by him in procuring an order for the sale of goods, may be shown by parol, in a proper case, though the order contained the provision that the principal will not be bound by terms not in the written order.
3. Sales: REFUSAL TO ACCEPT. Independently of an express contract, a purchaser by sample may refuse to receive the goods when delivered, if they fail to correspond to the sample. *National Engraving Co. v. Queen City Laundry, ante*, p. 402.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

George W. Wertz, for appellant.

Reeder & Lightner, contra.

BARNES, J.

Action to recover the price of certain jewelry alleged to have been sold and delivered by plaintiff to defendant on a written order or contract. The petition was in the usual form. Defendant admitted giving the order for the goods mentioned in plaintiff's petition, and alleged that it did not contain the entire contract; that a part thereof was omitted by mistake at the time the order was given.

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It was further alleged that it was agreed by and between plaintiff and defendant, at the time defendant signed the order in question, that if the articles mentioned therein were not satisfactory or equal in quality, value or pattern to the samples shown and exhibited to the defendant by plaintiff's agent or traveling salesman, the defendant should have the right to return all unsold articles, with payment for what had been sold, and the contract of sale should thereby be canceled. It was further alleged that prior to the signing of the contract, and as an inducement to the defendant to enter into the same, plaintiff falsely and fraudulently stated to the defendant that it was a manufacturer of jewelry, such as was exhibited by sample; that the prices affixed to each of the articles mentioned in the contract were the regular wholesale prices of such goods, and as cheap as any wholesale dealer could sell such merchandise; that plaintiff also falsely and fraudulently stated to defendant that all of said merchandise described in the written order would be fully equal to the samples exhibited, for quality, appearance and workmanship; that the goods were of a superior quality of gold plate, possessing good wearing qualities, and would give satisfaction to the trade generally; that at that time defendant was not familiar with the wholesale or trade prices of the goods mentioned in the contract, all of which was well known to the plaintiff; that believing the false and fraudulent representations so made by the plaintiff, relying thereon, defendant entered into the contract; that shortly after the receipt of the goods defendant discovered that all of the plaintiff's statements were false and untrue; that plaintiff was not a manufacturer; that the jewelry delivered was not equal to the samples shown to defendant, either in quality, workmanship or appearance; that the goods were not a superior quality of gold plate, and did not possess good wearing qualities; that, in fact, the goods were of no value, and were a positive damage to any dealer who would sell the same; that the prices affixed to the different articles were not the regular wholesale or

trade prices thereof; that such goods were being sold by reputable wholesale dealers from 40 to 50 per cent. less than the prices named in the order; that, upon the discovery of said facts, the defendant rescinded its said order and returned to the plaintiff all the unsold goods then on hand, together with payment for all that had been sold. The defendant prayed that the contract be reformed to correspond with the true contract between the parties, and that defendant have judgment for a dismissal of plaintiff's cause of action, together with such other relief as might to the court seem just and equitable. The reply, in substance, was a general denial. The cause was tried to the court, without the intervention of a jury. Defendant had the judgment, and the plaintiff has appealed.

It is contended that the evidence does not sustain the findings and judgment of the trial court. It appears that defendant, to maintain the issues on its part, produced several competent witnesses who testified that the goods in question were of a cheap and inferior quality; that the wholesale price on that class of goods ranged from 20 to 200 per cent. less than the prices named in the written order. The members of the defendant company testified that, at the time they made the order, they had no experience in the business of buying and selling jewelry; that they relied on the statements made by the plaintiff's traveling salesman, and that his statements were false and untrue in many particulars. This evidence was disputed by plaintiff's traveling salesman and by its president. The testimony shows beyond question that plaintiff's traveling salesman, at the time he took the order in question, had samples of the goods which he proposed to sell, and stated that the articles mentioned in the written order were equal to such samples in quality, workmanship and appearance. There was some competent testimony introduced by the defendant tending to show that the goods actually delivered were much inferior in quality, value and appearance to the samples which were exhibited to defendant at the time plaintiff obtained the written order. It was also

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shown that shortly after defendant received the goods in question they ascertained their true condition and value, and, upon finding that they were not equal to the samples, defendant returned the shipment to the plaintiff, paying the return charges thereon, and forwarded a draft for the price of the small portion of the goods sold before ascertaining their actual quality and value. It appears that plaintiff refused to accept the goods and brought this suit to recover the agreed price thereof. Having in view the rule that the finding of a court in such an action has the same force as the verdict of a jury, we are of opinion that the plaintiff's contention that the evidence was insufficient to sustain the judgment must fail.

As we view this case, it must be ruled by *National Engraving Co. v. Queen City Laundry*, ante, p. 402, where it was held that, independently of an express contract, a purchaser by sample may refuse to receive the goods when delivered, if they fail to correspond to the sample. In such case a return of the goods, with payment for such as were received and sold, is a defense to an action for the purchase price thereof.

The defendant in this case having pursued that course, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion only.

STATE, EX REL. GRANT G. MARTIN, ATTORNEY GENERAL,
RELATOR, V. JOHN J. RYAN ET AL., RESPONDENTS.

FILED DECEMBER 18, 1912. No. 17,363.

1. **Statutes: ENACTMENT: AMENDMENT.** Where amendments have been made to a bill after its first or second reading in either house, it is not essential or necessary that it be again read at large on three different days in each house in order to comply with section 11, art. III of the constitution.

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2. ———: ———: ———. Where a bill has been introduced into the legislature within the time limited by the constitution for the introduction of bills, amendments which are within the general purpose of the bill may be made after that limit has expired.
3. **Estoppel: MANDAMUS: STATE AS NOMINAL PARTY.** A mandamus proceeding brought by a private citizen cannot estop the state in other litigation from taking a different position from that taken by the relator in the mandamus proceedings, since the state is only a nominal party thereto under section 2, ch. 71, Comp St. 1911.
4. **Officers: REMOVAL: POLICE COMMISSIONERS.** Members of the board of fire and police commissioners of the city of South Omaha who, together with police officers under their supervision and control, have actual knowledge of frequent violations of the laws of the state by saloon-keepers in selling liquors on election day and Sundays and at prohibited hours of the night, and make no attempt in good faith to suppress such crimes or to enforce the law, are guilty of a wilful refusal to perform their duty.
5. **Evidence held** to support the findings of fact of the referee.

ORIGINAL application in *quo warranto* to oust respondents from the office of fire and police commissioners of South Omaha. *Judgment of ouster.*

Grant G. Martin, Attorney General, George W. Ayres and J. D. Ringer, for relator.

Harry B. Fleharty, Smyth, Smith & Schall and W. J. Connell, contra.

LETTON, J.

This is an original proceeding in *quo warranto* against the respondents, John J. Ryan and Joseph Pivonka, fire and police commissioners of the city of South Omaha. Nebraska, brought under the provisions of "An act to provide for the removal by *quo warranto* of derelict officers," commonly known as the "Sackett law." Laws 1907, ch. 87; Comp. St. 1911, ch. 71, secs. 1a, 1b.

The information sets out at length that there are three members of the board of fire and police commissioners, two of whom are the respondents and the other is the

mayor of the city. It sets forth specifically the statutory duties of the board with respect to the police force of the city, the granting of licenses for the sale of liquors, and the enforcement of the laws of the state and ordinances of the city with respect to the liquor traffic. It then alleges that the respondents have wilfully failed, neglected and refused to enforce the laws of the state of Nebraska in these respects, setting forth specific charges of neglect of duty, and naming the time when and the individual with respect to whose conduct the wilful failure to enforce the laws took place. The prayer is that the right and title of each of the respondents to hold the office of member of the board of fire and police commissioners be declared forfeited and that they be ousted from office. A motion to quash the information was filed, which was overruled. The respondents answered by a general denial, and a denial of the jurisdiction, and of the sufficiency of the facts pleaded to constitute a ground for the relief sought. Afterwards objections were filed to the jurisdiction of the court over the subject matter of the action, for the alleged reason that the term of office of the respondents had expired April 8, 1912, that the offices had been filled at an election held April 2, 1912, and that the board duly elected at such election had qualified and assumed the duties of the office. These were overruled and the Honorable Silas A. Holcomb, formerly chief justice of this court, was appointed referee to take the testimony and report his findings of fact and conclusions of law to the court.

At the time of the hearing before the referee, and before any testimony was offered, the respondents asked leave to file an amended and supplementary answer, which, in addition to the former defenses, pleaded that on April 5, 1910, respondents were elected members of the board for two years and until April 9, 1912; that in 1911 the legislature pretended to amend the statutes so as to abrogate the holding of a city election in the year 1912, and to provide that the officers elected in 1912 should hold their offices until 1913; that the attempted amendments were

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void because not made until more than 40 days of the sitting of the legislature had elapsed, and not until the 52d day of the session; that they are not germane to the original bill; and that they were not read at large on three different days in either house of the legislature, and, hence, are unconstitutional and void; that the term of office which respondents were filling at the time the information was filed against them expired by limitation on April 3, 1912, and therefore they ceased to hold the office or the term of office for which they were elected in April, 1910; that afterward certain proceedings were had in the district court for Douglas county whereby a mandamus was issued causing an election to be held on April 2, 1912, for the election of city officers to succeed the respondents; that such an election was held and the respondents were re-elected to their respective offices to succeed themselves for the term of two years commencing on April 9, 1912, and that they qualified therefor and entered upon the duties thereof, and that they are now holding the office by virtue of this later election. The referee permitted the amended and supplementary answer to be filed, but made no ruling as to its effect.

A large number of witnesses were examined in behalf of both the relator and the respondents and much documentary evidence was submitted. When the evidence with respect to the mandamus proceedings was offered, the referee held that "the proffered evidence is not admissible under the issues as at present formed, but, in view of the possible ruling by the court admitting an amendment to the pleadings, will permit the proffered evidence to be made a part of the record."

The referee found that the respondents were elected in April, 1910, and are now members of the board of fire and police commissioners by virtue of such election; that a part of the duties of the board was to keep a record of its proceedings as a public record, that a partial record was kept, but not a full and complete record as required by law; that for the years 1910 and 1911 the board granted

about 80 licenses to different persons to engage in the saloon business in South Omaha, and that bonds were required from each in the penal sum of \$5,000 conditioned as provided by law; that 31 of the whole number of bonds given and approved were signed by sureties who had each justified as worth \$2,500 over and above all his debts, obligations and exemptions, and on each bond was a printed form whereon each had sworn that he was not principal or surety upon any other bond; that of these 31 bonds the "signers were in almost every instance worthless as sureties, and said bonds so taken, accepted and approved were wholly and entirely inadequate and insufficient for the purposes mentioned and contemplated by law; and that the penal sum mentioned in said bonds could not be collected from any one or all the sureties who signed said bonds. * * * That no investigation was made by said respondents to ascertain the worth, property and qualifications of the sureties on said bonds so taken and accepted, save such information as was contained in said justifications so made by each and all of said sureties who respectively signed said bonds; that the city attorney advised said respondents as members of the said board of fire and police commissioners that when bonds were presented, whereon the sureties had justified or qualified, as aforesaid, they (the respondents) were not charged with the duty of making other or further inquiry regarding the responsibility and efficiency of the sureties so offered on the respective bonds by them accepted and approved; that gross carelessness characterized the action of the respondents in approving said bonds and granting licenses to the respective applicants therein mentioned, and that reasonable inquiry upon their part would have disclosed the fact that said sureties were not qualified, and did not possess property of the value stated subject to execution over and above debts and exemptions, and that said bonds were wholly and totally inadequate; that in several instances said respondents were charged with knowledge of facts and circumstances which would put a reasonably prudent

and careful person upon inquiry as to the sufficiency of the bonds and the sureties thereon so offered for approval by the different applicants for saloon licenses. I find that the action of the respondents in the acceptance and approval of said inadequate and insufficient bonds and the granting of licenses to the respective applicants was not a wilful failure or refusal to enforce the law with respect to the giving and approval of such bonds within the meaning of section 1731a, Ann. St. 1911."

The report then makes specific findings that certain keepers of saloons, giving their names, between May 1, 1910, and October 1, 1911, violated the law by selling and giving away intoxicating liquors during the hours prohibited by law and on election days and Sundays. It continues: "That during the period covered by and mentioned in the information filed in this case, to wit, from May 1, 1910, to October 1, 1911, and while the respondents were acting as fire and police commissioners, there were many and repeated violations of the law with respect to the sale of intoxicating liquors by persons to whom license to sell had been granted, by the sale and giving away of intoxicating liquors at their several places of business between the hours of 8 P. M. and 7 A. M., also on election days and on Sundays. * * * That respondents personally knew of some instances of violations of the law in the above mentioned respect; that many complaints were made to them of alleged violations, and the repeated and continued violations in that regard were such as that they must have known that the law was not being observed by the licensed saloon-keepers, but, on the contrary, was being continually, openly and notoriously violated; that during said period, and at times when illegal sales were made in violation of law, the front doors of the saloons were generally closed and locked, but entrance thereto was obtained through side and rear doors by those that were procuring liquors during such prohibited hours; that the prevailing sentiment among the inhabitants of said city of South Omaha was and is averse to the require-

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ments of law prohibiting the sales of liquor between the hours mentioned and on election days and Sundays, and favored a policy that permitted the obtaining and purchasing of intoxicating liquors during such prohibited hours and on Sundays; that the respondents neither themselves nor through the police department made any earnest, continued or persistent effort to enforce the law in regard to such sales or to prevent violations thereof, or to punish those guilty of such violations, nor did they act in good faith regarding the enforcement of such laws, nor did respondents use reasonable effort or actively endeavor either by themselves or through the police department to secure the enforcement of such laws, and they failed to adopt any efficient rules and regulations, or any rules and regulations whatever, for the purpose of securing the enforcement of the law in regard to sales at times prohibited by law, and to punish violations thereof, to control the traffic and require observance of the law in that regard

* * * That no continued, persistent or determined effort was made during said time on the part of the respondents, or caused to be made by them, to require and compel licensed vendors to observe the law by abstaining from the sale of intoxicating liquors after 8 P. M. and before 7 A. M. and on election days and on Sundays, and no sufficient rules nor regulations were adopted by said fire and police commissioners with the view of requiring, instructing and directing the members of the police force to prevent such violations and to punish those violating the law in regard to such prohibited sales; that in regard to the sales of intoxicating liquors by licensed vendors or saloon-keepers between the hours of 8 P. M. and 7 A. M. and on election days and on Sundays during the period of time mentioned in the information, to wit, from May 1, 1910, to October 1, 1911, respondents have wilfully refused, failed and neglected to enforce the law which it was their duty to enforce within the meaning of said section 1731a." The referee finds as conclusions of law: "(1) That respondents and each of them have forfeited

their right and title to the office of member of the board of fire and police commissioners of the city of South Omaha now held by them. (2) That a judgment of ouster should be entered removing them and each of them from such office."

Exceptions were filed to the findings of facts adverse to the respondents, and also to the report, for the reason that the referee did not make any findings upon the issues tendered by the amended and supplemental answer. The case has been submitted upon these exceptions, and upon the motion of the attorney general to confirm the report of the referee and for a judgment of ouster.

We will first consider the contention of the respondents that the evidence is not sufficient to sustain a finding that the respondents have wilfully and unlawfully failed, neglected and refused to enforce the laws of the state of Nebraska. It is impossible within the necessary and proper limits of this opinion to set forth the evidence. Each of the respondents testifies that, while he had no personal knowledge of violations of the liquor law, complaints came to him that the laws regulating the liquor traffic were being violated, and that, in consequence thereof, a resolution was passed by the board instructing the chief of police to exert every energy in the pursuit and conviction of offenders against the law. It is shown that this resolution was adopted unanimously and communicated to the chief of police and to the officers under his control and direction. There is evidence in the record that as to some of the saloon-keepers, these respondents endeavored to enforce the law, but the conclusion which we draw from the testimony as a whole is that the findings of fact to which exceptions were taken are amply supported by the testimony. We are also inclined to the view that the evidence as to the approval of bonds would justify a conclusion less favorable to respondents than that drawn by the referee.

Respondents contend that they are not holding the same terms of office that they held when these proceedings com-

menced, and cannot be removed from their present office because of misconduct committed during a prior term. This contention, however, was made and disposed of at a prior hearing in this case (*State v. Ryan*, 91 Neb. 696), and it is unnecessary to repeat what is said in that opinion.

The supplementary and amended answer filed with the referee, however, seeks to raise for the second time this issue upon other grounds, and while, on account of the late day of its tender, we perhaps should not allow it to be filed, we have considered its allegations as a part of the issues. It pleads, in substance, that the amendatory act (laws 1911, ch. 12) was not passed in accordance with the requirements of the constitution, and is illegal and void, and, hence, that respondents' term ended in April, 1912. It is said that the original bill (Senate File No. 93) was introduced within 40 days after the meeting of the legislature provided for that purpose, and that on the 52d legislative day the legislature attempted to amend the bill with respect to the terms of officers of the city, and the time and manner of holding city elections, and that the sections thus sought to be changed were in nowise referred to in the original bill and bear no relation thereto. The bill, as originally introduced, provided for the amendment of certain sections of the charter of South Omaha. The amendments made to the bill provided, in addition, for the amendment of certain other sections of the charter. It is contended that since this court has held that under a restrictive title of an amendatory act the amendment must be germane to the original section proposed to be changed, and since, after the time for the introduction of bills had expired, certain new sections were embraced in this act by amendment, the principles announced in *State v. Tibbets*, 52 Neb. 228, apply, and the amendment is void. We think this result does not follow. The legislature has full control over the passage of bills, and may amend the same and the title to the same at any time permitted by its rules during their progress through the legislature. If

the amendment is germane to the subject of the original bill, and not an evident attempt to evade the constitution, the fact that the time limit for new bills has expired is immaterial. A case directly in point is *Common Council of Detroit v. Schmid*, 128 Mich. 379, in which it is said: "Section 28, art. 4, of the constitution, providing that no new bill shall be introduced in the legislature after the expiration of the first 50 days of the session, does not prevent the substitution of one bill for another after such period, provided the subject matter of the substituted bill is germane to the general purpose indicated by the title of the original bill. Under this rule, a bill purporting by its title to amend a specified section of a city charter, without stating the subject of the section, may have substituted for it a bill to amend a certain other section of the same charter, the subject matter of which has no necessary connection with that of the former section." See, also, *Attorney General v. Stryker*, 141 Mich. 437; *Pack v. Barton*, 47 Mich. 520; *Hale v. McGettigan*, 114 Cal. 112. Furthermore, the language of the opinion in the *Tibbets* case is applicable to the amendment by a new statute of a previously existing law, and not to the amendment in the legislature of a mere bill for an act.

It is also contended that the bill was not read at large in either house on three different days, and that the journals of the house and senate show this to be the fact. The fact that after amendments have been made the bill as amended is not read upon three different days is not material or essential. If this was necessary and each amendment necessitated three separate readings of the bill in each house thereafter, the process of legislation would be interminable. *State v. Liedtke*, 9 Neb. 490; *Cleland v. Anderson*, 66 Neb. 252, 262. As to the other point, we have examined the original enrolled bill and the recorded history, in the office of the secretary of state, of its progress through the legislature. These show that the title to the bill was amended in the senate before it reached the house; that it was sent to the house under the amended

title, and read there the first time under the same; that the house reported to the senate that it had passed the bill under the amended title; that it was enrolled under the proper title, as certified by the joint committee; and that it was certified by the proper officers as having passed under the proper title. The only discrepancy is that the printed house journal recites that the bill under its proper number, but under the original title, was read the third time and passed. It is apparent that the statement in the printed journal that the bill was read in the house for the third time by its original title is erroneous. Considering the whole history, and applying the presumptions of validity, we are satisfied that the bill followed the constitutional route. *State v. Moore*, 37 Neb. 13.

It is also urged that the state of Nebraska is estopped to urge that respondents' term of office did not expire in April, 1912, for the reason that certain proceedings were had, entitled the State of Nebraska, ex rel. Thomas Hector and August Miller, v. Patrick J. Trainor and Frank H. Good, the Mayor and City Clerk of South Omaha, to compel the calling of an election on April 2, 1912, in the city of South Omaha for the election of city officials, including members of the board of fire and police commissioners. As a result of the suit a peremptory writ was issued commanding the calling and holding of the election. At this election the respondents were elected to a term of office beginning on the 9th day of April, 1912. Respondents argue that, since the state went into the district court alleging that the terms of the city officers elected in April, 1910, expired in April, 1912, and obtained the writ mentioned, it is now estopped to say that the respondents are still holding the term for which they were elected in 1910. This position is untenable. Under the statutes of this state, any citizen may sue out writs of mandamus without application to the prosecuting attorney. Comp. St. 1911, ch. 71, sec. 2. This being so, we can see no basis upon which an estoppel against the state

can arise. We have not been cited to any authority so holding, and are satisfied that none such can be found.

It is insisted that the information does not state a cause of action for a wilful failure to enforce the saloon closing laws. The gist of the argument on this point is that, under the statute, it is not the duty of the board of fire and police commissioners to file complaints or to prosecute violations of the law, and that such matters are under the sphere of duty of the mayor and chief of police. But the charter provides: "The board of fire and police commissioners shall have the power, and it shall be the duty of said board to appoint a chief of police, and such other officers and policemen, all of whom shall be electors of such city, to the extent that funds may be provided for by the mayor and council, to pay their salaries, and as may be necessary for the proper protection and efficient policing of the city, the chief of police and all other police officers and policemen shall be subject to removal by the board of fire and police commissioners under such rules and regulations as may be adopted by said board, whenever said board shall consider and declare such removal necessary for the proper management or discipline or for the more effective working or service of the police department. * * * It will be the duty of said board of fire and police commissioners to adopt such rules and regulations for the guidance of the officers and men of said department, for the appointment, protection, removal, trial, or discipline of officers or policemen as said board shall consider proper and necessary." Section 8262, Ann. St. 1911. It further provides: "The chief of police shall have the supervision and control of the police force of the city, and in that connection he shall be subject to the orders of the board of fire and police commissioners, and all orders relating to the direction of the police force shall be given through the chief of police, or, in his absence, to the officer in charge of the police force." Section 8263, Ann. St. 1911.

In *State v. Donahue*, 91 Neb. 311, where it was sought

to remove the chief of police of Omaha under like proceedings, and where the provisions in the charter of the city were almost identical in respect to the powers and duties of the board of fire and police commissioners and the chief of police, it was held that the chief of police was not subject to removal, even though palpable and open infractions of law were proved, for the reason that he was carrying out the policy of his superiors, the board of fire and police commissioners. The opinion says: "He was appointed by the mayor and police board. He was removable by them at their pleasure. They had all of the information in regard to existing conditions that the respondent had. He knew what had been determined by his superiors to be a sufficient and proper enforcement of the law. He knew that if he violated their policy they might be expected to immediately remove him in favor of one who would obey instructions. * * *. If he in good faith believed that it was his duty to take such action in regard to the enforcement of the law as the mayor and board of fire and police commissioners prescribed for him he may have been mistaken, but it does not clearly appear that he acted wilfully." In the concurring opinion of the chief justice we find this: "Questions of this kind must be solved by a consideration of the facts in each particular case. If the mayor and police board, admittedly the superiors of the chief of police, knowingly and wilfully stand in the way of the enforcement of the law by their subordinate officers, it seems clear that they should not escape, and the whole of the penalties of the law inflicted upon their subordinates." The chief of police is not liable under this decision (as to which the writer dissented). If his superiors are likewise invulnerable to assault for failure to enforce the law, as respondents contend, the remedial statute under which these proceedings are brought may as well be repealed.

The evidence convinces us that the conduct of the respondents was such as to raise the bulwark of the *Donahue* case against every attempt by the state to remove the

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police officers of the city for such derelictions of duty as charged here, and that the information is sufficiently specific in the respect mentioned.

On the whole case, we are of the opinion that the report of the referee is eminently fair and just to the respondents, giving them the benefit of every doubt, and giving full weight to all the evidence produced in their behalf. We are also satisfied that the evidence is ample to sustain the conclusions of law. The exceptions are overruled, the report of the referee confirmed, and judgment of ouster rendered as prayed.

JUDGMENT OF OUSTER.

HARRY L. NORTON, APPELLANT, v. LINCOLN TRACTION
COMPANY, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,845.

New Trial: AMOUNT OF DAMAGES. "In an action for personal injuries, a new trial will not be granted on account of smallness of damages." *O'Reilly v. Hoover*, 70 Neb. 357.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

M. L. Kimmel, T. J. Doyle and G. L. De Lacy, for appellant.

C. S. Allen, contra.

ROSE, J.

This is an action to recover damages in the sum of \$10,000 for personal injuries caused by the alleged negligence of defendant in running a street car, on which plaintiff was a passenger, rapidly around a curve at Sixteenth and M streets in the city of Lincoln, and in throwing him

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violently to the pavement. The answer was a general denial and a plea of negligence on the part of plaintiff. From a judgment on a verdict in favor of plaintiff for one dollar, he has appealed.

The controlling question for review is the sufficiency of the evidence to sustain a verdict for one dollar only. Plaintiff was seriously injured. The jury found in his favor. He insists that evidence of his hospital expenses and of other definite items of pecuniary damage amounting to \$220.70 is undisputed; that therefore the verdict is too small to be sustained by the evidence; and that consequently a new trial should be granted. Defendant's answer to this argument is that section 315 of the code forbids the granting of a new trial on account of the smallness of damages awarded by a jury in an action for personal injuries. The precise question was considered in *O'Reilly v. Hoover*, 70 Neb. 357, and it was there held: "In an action for personal injuries, a new trial will not be granted on account of smallness of damages." Section 315 of the code, though repealed in 1911 (laws 1911, ch. 169), was in force when the trial court overruled plaintiff's motion for a new trial in the present action, and is binding on the parties thereto. The judgment below cannot be reversed without overruling the case cited, and it is deemed inadvisable to do so. Adherence to that case leaves the proceedings below without error.

AFFIRMED.

PHILIP C. SCHROEDER, APPELLANT. V. LODGE No. 188,
INDEPENDENT ORDER OF ODD FELLOWS, ET AL., AP-
PELLEES.

FILED DECEMBER 18, 1912. No. 16,838.

1. Trial: INSTRUCTIONS: ISSUES: SUBMISSION OF PLEADINGS TO JURY.

It is the duty of the court to fairly and fully state the issues to the jury; and, when it has done so, there is no necessity, nor is it a commendable practice, to permit the jury to take the plead-

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ings with them to the jury room; but the action of the court in doing so is not sufficient ground for a reversal of the judgment, where it appears that such action was not prejudicial to the party complaining thereof.

2. ———: ———: **FAILURE TO REQUEST.** "Before error can be predicated upon the failure of the court to present a particular feature of a case to the jury, the party complaining should, by an appropriate instruction, request the court to charge upon that feature." *German Nat. Bank v. Leonard*, 40 Neb. 676.
3. ———: ———: **REPETITION.** While frequent repetition of a proposition in the instructions of the court should be avoided, and in some cases may constitute prejudicial error, it will not be so held where it appears that the party complaining was not prejudiced thereby.
4. **Negligence: ACTION: CONSTRUCTION OF WALL.** One who constructs a wall so that if it falls it will fall upon and injure the adjoining premises is bound to so construct it that it will withstand any gales which, from past experience, are reasonably to be expected in that locality.
5. **Evidence examined, but on account of its voluminous character not set out, and held sufficient to sustain the verdict of the jury.**

APPEAL from the district court for Phelps county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

W. S. Morlan and James I. Rhea, for appellant.

W. D. Oldham and G. Norberg, contra.

FAWCETT, J.

Plaintiff brought this action in the district court for Phelps county, to recover damages to his store building and merchandise, occasioned by the falling of a brick wall of a building, being constructed by defendants, adjoining his building on the north. There was a verdict and judgment for defendants, and plaintiff appeals.

This action was brought against the lodge, its building committee, the independent contractor, and the contractor's bondsmen. The amended petition alleges that the building was erected in an unskilful and negligent man-

ner; that the wall of the building was carelessly and negligently built so that it overtopped plaintiff's building 12 feet; that it was allowed to remain in a green and immature condition, without properly bracing or staying the same, without joists, anchors or stays, and was permitted to remain unsupported so that it was liable to be blown down, and that, as a result thereof, it was blown down upon plaintiff's building, causing damage to plaintiff in the sum of \$3,000; that the falling of the wall was caused by a severe wind upon January 28, 1909. Upon the trial all of the defendants were released by the instructions of the court except the contractor, defendant Anderson. As to him the case was submitted to the jury. No error is urged here by reason of the release of the other defendants, and the case will therefore be considered only as to defendant Anderson, who will be hereinafter referred to as the defendant.

The answer of the defendant admits that, at the time of the injury complained of, he was engaged in the erection of the brick building referred to in plaintiff's petition, and alleges that, "at the time of the injury complained of in plaintiff's amended petition, there was an unprecedented wind-storm or hurricane that swept over the village of Bertrand and the adjacent country; that all of the injury alleged to plaintiff's property by reason of the wall in process of construction by this defendant was occasioned by the act of God, and not by any negligence or default on the part of this defendant;" alleges, further, that the building was being constructed in a good, workmanlike manner; that the walls were well braced and anchored; and that every reasonable precaution was exercised by defendant to construct the building in a good, workmanlike manner; and denies all other allegations in the amended petition. The reply was a general denial. Plaintiff argues five assignments of error, which we will consider in their order.

1. "It is the duty of the trial court to state to the jury the issues on which they are to find. Reference to the

pleadings, instead of a statement of the issues directly, is good ground for reversal." This assignment would imply that the court in its instructions did not state the issues to the jury, but referred them to the pleadings for such issues. The fact is, the court in its statement of the case set out the allegations of the pleadings quite fully; if anything, more so than was necessary; and then added: "You will be permitted, gentlemen of the jury, to take the pleadings with you to your jury room, wherein the contentions of the parties are fully set forth, namely, the amended petition, the separate answers of the defendant Anderson, and the reply of the plaintiff, to which you may refer for a more complete statement of the issues." We think it would have been better if the court had not done this, but doing so could not have worked any prejudice to the plaintiff, for the reason that, so far as the issues between plaintiff and defendant Anderson were concerned, the pleadings would not show anything more or less than was included in the statement of the issues by the court. This assignment, therefore, is without merit.

2. "Where, in an action for damages caused by a falling wall, the answer admits that the wall fell, and sets up an act of God as a defense, the burden of proof is on the defendant." It is argued that the statement in the answer, "that all of the injury alleged to plaintiff's property by reason of the wall in process of construction by this defendant was occasioned by the act of God," is an admission that the wall fell and that plaintiff's property was injured thereby, and is an attempt to avoid liability by pleading an act of God; that this issue makes out a *prima facie* case against the defendant, and that therefore the burden of proof was upon the defendant to establish his defense that the injury was caused by an act of God. It is further argued that instruction No. 2 and, to some extent, instruction No. 4 "are so worded as to lead the jury to believe that under the pleadings there was nothing for the defendants to do. The whole burden of proof is on the plaintiff. They entirely ignore the fact that the admissions of Ander-

son's answer make out a *prima facie* case for the plaintiff. In other words, these instructions, at the start, give the jury to understand that there is a presumption that the wind was an act of God, and that the burden was on the plaintiff to prove that the wind was not an act of God, and that the wall fell because of defendants' negligence." While we agree with plaintiff's contention that, where the act of God is pleaded as a defense, the burden is upon the defendant to establish his plea (*City of McCook v. McAdams*, 76 Neb. 11), we cannot concur in his construction of instruction No. 2. That instruction is the one ordinarily given. It reads as follows: "The court instructs you, gentlemen of the jury, that the burden of proof in this case is upon the plaintiff, and before he would be entitled to recover he must establish by a preponderance of the evidence the truth of every material allegation in his amended petition, not admitted by the defendants, which material allegations are: (1) That the walls of the Odd Fellows' building fell as a result of the negligence and carelessness of the defendant contractor, Magnus Anderson; (2) that plaintiff's property was damaged by reason of the falling of the walls of said building; and (3) the amount of said damage." It will be seen that this instruction is directed solely to the plaintiff's petition, and tells the jury what the plaintiff must establish, in the first instance, in order to entitle him to recover. In that respect the instruction is correct. Instruction No. 4 simply told the jury that "the burden is upon the plaintiff, and it is for him to prove every material allegation of his petition by a preponderance of the evidence. If, upon any one or more of the material allegations of the plaintiff's petition, the evidence is evenly balanced, or if it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury should find for the defendant." This instruction also applied to the case in chief by the plaintiff, and is correct.

After having instructed the jury as to the allegations contained in plaintiff's petition, and what it was necessary

for the plaintiff to prove in support thereof, the instructions take up defendant's answer, when we have the following: "Instruction No. 10. The court instructs the jury that the defendant Magnus Anderson has pleaded as a defense, in this cause of action, that the walls of the building in controversy were in process of erection by him at the time of the injury complained of by the plaintiff; that he was erecting the building in a good and workman-like manner, and had placed the proper protection and braces around and against the walls to protect them against falling down from any condition of the elements that might reasonably have been anticipated at the time and place at which the building was being constructed, and that the injury, if any which the plaintiff received, was occasioned by an unexpected wind-storm of unprecedented velocity in the vicinity in which the building was being constructed, and the injury to the plaintiff was occasioned by the act of God, and not by any negligent act on the part of the defendant Magnus Anderson." This was a correct statement of the defense as pleaded by defendant.

Then followed instruction No. 11: "The court instructs you that by the defense which is styled in legal terms 'the act of God' is meant some inevitable accident which cannot be prevented by human skill and foresight, but results solely from natural causes, such as cyclones, earthquakes, tempests, floods or inundations, and if you believe from the evidence that the injury to the plaintiff was occasioned solely by the wind-storm of unexpected and unprecedented violence, and not by any negligent act of the defendant in the construction of the building, then your verdict should be for the defendant." The only objection which could be urged to instruction No. 11 is that it does not in express terms say that "the burden is upon the defendant" to prove the facts which the jury are therein told they must find in order to warrant their returning a verdict for the defendant. The most that can be said, therefore, is that the instruction is not sufficiently explicit. If the plaintiff desired a more explicit statement, he should have brought

the matter to the attention of the court by a request for an instruction that would be satisfactory to him. Not having done so, this assignment must fail. *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb. 421; *German Nat. Bank v. Leonard*, 40 Neb. 676.

3. "The frequent repetition of a proposition in the instructions of the court gives the same undue prominence, and is therefore error." This assignment is based upon instruction No. 14, given by the court on its own motion, and instructions 10, 11 and 12, given at the request of defendant. The contention is that the court in all four of those instructions told the jury that the defendant was not liable if they found the injury to the plaintiff's building resulted from an extraordinary wind-storm, and not from the negligence of the defendant. As the court had covered that proposition quite fully in its instruction No. 14, it really was not necessary for it to have given the three instructions requested by defendant; but we are unable to see how the plaintiff was prejudiced by the court's giving prominence to the fact that, in order to exonerate the defendant, the jury would have to find that the injury to plaintiff's building resulted from an extraordinary wind-storm, and not from the negligence of the defendant. Had the court given all four of those instructions upon its own motion and plaintiff had recovered a verdict, we can understand how defendant might have felt aggrieved at such repetitions; but they certainly could not have operated to plaintiff's prejudice.

4. "It is the duty of a person building a brick wall close to the premises of another to so construct the same that it will withstand all gales which are reasonably to be expected in that locality. A wall which will merely withstand ordinary storms is not sufficient." Upon this point, plaintiff complains of the action of the court in giving instruction No. 12, requested by defendant, and refusing instruction No. 4, requested by plaintiff. The objection to No. 12 is based upon this language in the instruction: "The court instructs the jury that, in the construction of

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the walls in controversy, the defendant Anderson, as contractor and builder of said wall, would be liable to the plaintiff for injury occasioned to his property by the negligent construction of the walls or the failure of the defendant to properly guard and brace said walls against any ordinary storm or wind that may have reasonably been expected to have occurred at the time and place at which the building was constructed." If this language stood alone in the instruction, plaintiff might have cause for complaint; but it is followed by the following, separated only by a comma from what we have already quoted: "And the defendant Anderson would be liable for all consequence connected with the construction of the wall, which might have been foreseen and expected as a result of his conduct, but he would not be liable for any consequence which he could not have foreseen and was not morally obliged to take into consideration in the prosecution of his work, and if the jury believe from the evidence in this case that the proximate cause of the injury to plaintiff's building and contents was a wind of unusual and unexpected velocity such as a reasonable man would not anticipate, then the defendant is not liable for the injury, if any, which may have been suffered by the plaintiff, unless you find from the evidence that the defendant, Anderson, neglected to put proper bracings and supports around the walls of the building which he was constructing to protect them against such ordinary storms and winds as might have been reasonably expected at the time and place at which the building was being constructed." We do not see how this instruction, taken as a whole, could have misled the jury into believing that the defendant was not bound to so construct and protect his wall as to guard against any wind-storm which might reasonably be expected, and that he would only be excused in the event that the injury resulted from a "wind of unusual and unexpected velocity such as a reasonable man would not anticipate." By instruction No. 4, requested by plaintiff, and refused, the court was asked to instruct

the jury, among other things, that "it was the duty of the defendants to consider what was likely to occur during a severe or strong wind, and they were required by law to so erect and construct the walls of said building and keep them in such condition they would withstand the conditions that might reasonably and ordinarily be expected in the country where they were erecting said building. The principal fact in this case left for you to determine is: Did the defendants so erect and leave the walls of said building in a condition in which they would be expected to remain and be reasonably safe? Did they do all that prudence or forethought would demand of them? In other words, if you believe a wind-storm might be expected in the country where said building was built that would blow over or down said walls and render them dangerous, then negligence would be chargeable against the builders and constructors of said building." The last sentence quoted from that instruction is not the law, even under the authorities cited by plaintiff. The duty devolving upon the defendant was not to guard the wall against such a wind-storm as "might be expected." It was to guard the wall against such a wind-storm as might "reasonably" be expected. The quotation made by plaintiff upon this point from *Cork v. Blossom*, 162 Mass. 330, so states, viz.: "If a person builds and maintains upon his premises a chimney so that, if it falls, it will fall upon and injure the adjoining premises, he is bound, in the exercise of proper care, to construct it so that it will withstand any gales which experience shows are reasonably to be anticipated in that locality." That is a correct statement of the law, and it shows the error in the instruction requested by plaintiff.

Finally: "The verdict is not sustained by the evidence, but is contrary thereto." It would serve no good purpose to set out the voluminous testimony or to even attempt to give a synopsis of it here. It is sufficient to say that upon every material point it is conflicting, and is ample to sustain the verdict.

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Finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

MARY BUTLER, APPELLANT, V. FARMLAND MORTGAGE & DEBENTURE COMPANY ET AL., APPELLEES.

FILED DECEMBER 18, 1912. No. 16,893.

Estoppel by Deed. *Stratton v. McDermott*, 89 Neb. 622, reexamined, reaffirmed, and the case at bar held ruled thereby.

APPEAL from the district court for Knox county: ANSON A. WELCH, JUDGE. *Affirmed.*

M. F. Harrington and W. R. Butler, for appellant.

Fred H. Free and G. T. Kelley, contra.

FAWCETT, J.

The land involved is the southeast quarter of section 30, township 29 north, of range 4 west, in Knox county, Nebraska. In 1890 one Crittenden, then the owner of the land, executed and delivered to defendant mortgage company a mortgage thereon to secure the sum of \$900, due and payable October 1, 1895. In March, 1896, Crittenden sold and conveyed the land to one Jackson. In the deed Jackson, the grantee, was designated as A. R. Jackson. This deed was duly recorded. In his deed Jackson assumed the Crittenden mortgage. Default having been made upon the mortgage, the loan company, in April, 1896, brought suit to foreclose the same and made "A. R. Jackson" a defendant. Jackson being a nonresident, service by publication was had upon him by the name which appeared in his deed of conveyance from Crittenden, viz., A. R. Jackson. A decree of foreclosure was entered, and at the sheriff's sale the loan company was the purchaser. The sale was confirmed

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and deed issued to the loan company. In 1901, and after having obtained its sheriff's deed, the defendant loan company entered into a contract with one Stevens for a sale of the land. Stevens assigned his interest in the contract to defendant Cox, and defendant McColley is a tenant under defendant Cox. In view of the conclusion reached in this case, it will not be necessary to again refer to the three last named defendants. In May, 1905, for an alleged consideration of \$25, plaintiff obtained from Jackson a quit-claim deed to the land. Jackson's name appeared in the body of the deed as A. R. Jackson, and the deed was executed and acknowledged in the same manner. Plaintiff brought this suit in the district court for Knox county, as such grantee of Jackson, to redeem from the mortgage above referred to and for an accounting of the rents and profits. From a judgment in favor of the defendants, plaintiff appeals.

The ground upon which plaintiff bases her claim for reversal is that the foreclosure of the mortgage as to Jackson was void, for the reason that he was sued by the initial letters of his Christian name, and that the service by publication upon him was likewise by such name. In plaintiff's brief it is urged that the case is controlled by *Enewold v. Olsen*, 39 Neb. 59; *Gillian v. McDowall*, 66 Neb. 814; *Herbage v. McKee*, 82 Neb. 354; *Butler v. Smith*, 84 Neb. 78, and other cases, which are to the effect that, "in law, the name of a person consists of one given name and one surname, the two, using the given name first and the surname last, constitute such person's legal name; and to be ignorant of either the given or surname of such a one is to be ignorant of such person's name within the meaning of section 148 of the code of civil procedure (*Enewold v. Olsen*, *supra*);" and, "unless a defendant sued by the initial letters of his name under section 148, code of civil procedure, is served personally or makes an appearance in the case, the judgment or decree rendered therein is not binding upon him." *Gillian v. McDowall*, *supra*.

Defendants contend that, Jackson having taken a deed

to the property in the name of A. R. Jackson and recorded the same under that name, and plaintiff having accepted from Jackson a deed in which he is described and which he executed as A. R. Jackson, and recorded the same, they both thereby represented to the world that A. R. Jackson was Jackson's true and only name, and that plaintiff is now estopped to claim that his name is other than that set out in those deeds. Defendants insist that the cases relied upon by plaintiff have no application to the case at bar, but that the case is ruled by *Stratton v. McDermott*, 89 Neb. 622. We think defendants' contention is sound and must be sustained. In *Stratton v. McDermott*, the doctrine of estoppel, now contended for by defendants, was fully and very carefully considered by this court, and, while the opinion in that case was not by a unanimous court, it, of course, has the same force and effect as if it had been unanimous. In that case the cases now cited and relied upon by plaintiff were all carefully considered, and this court, after such full and careful consideration, announced the law as contended in the syllabus, viz.:

"1. The surname and an initial letter may constitute the full name of an individual, and, when a grantee is so named in his title of record, it will not be presumed that he has another name. If he conveys the land in the name by which he holds it of record, he will be estopped as against his grantee to allege that it is not his true name.

"2. A deed was taken in the name of H. Emerson as grantee. It was duly recorded, and the grantee took possession of the land thereunder. There was nothing upon the deed record indicating that the grantee had any other name. In the meantime the county brought an action against H. Emerson and others to foreclose its lien for taxes which were delinquent for several years; the action proceeded to foreclosure and sale, and sheriff's deed issued, which it is stipulated also described him as H. Emerson. *Held*, That Emerson's grantee is estopped to allege, in an action to quiet his title against the purchaser at said sheriff's sale, that his grantor's true name was not H. Emerson."

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No sufficient reason has been assigned for a departure from the doctrine so carefully considered and announced in *Stratton v. McDermott*, and it is reaffirmed. The judgment of the district court being in harmony therewith, it is

AFFIRMED.

CHARLES DEEDER V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1912. No. 17,752.

1. **Evidence: SECONDARY EVIDENCE.** "What the law requires is the production of original evidence, the best evidence obtainable; secondary evidence being admissible only when for some reason primary evidence cannot be secured." *Donner v. State*, 69 Neb. 56.
2. ———: ———: **FRAUD AT ELECTION: MISREADING BALLOTS.** In the prosecution of a judge of election under an information charging him with having wilfully and wrongfully misread the ballots cast at a general election, the ballots cast at such election are the best evidence of how and for whom they were cast; and, unless it be first shown that such ballots have been lost, or so mutilated as to render them inadmissible as evidence, secondary evidence of such facts is not admissible.

ERROR to the district court for Hitchcock county: **HARRY S. DUNGAN, JUDGE.** *Reversed.*

C. E. Eldred and F. M. Flansburg, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

FAWCETT, J.

Plaintiff was informed against in the district court for Hitchcock county. The gist of the charge is that defendant, being a duly appointed, qualified, and acting judge of election at the general election for the year 1909, "did then and there fraudulently, unlawfully, knowingly and wil-

fully violate his official oath and duty in that said Charles Deeder did not then and there cause the ballots which had been then and there taken and cast at said election to be fully read and ascertained, and did not then and there cause a true statement of the ballots then and there taken and cast at said election to be made according to the best of his knowledge and ability, in that said Charles Deeder did then and there fraudulently, unlawfully and wilfully read and cause to be read and counted certain ballots to the number of 16, or some other number, then and there cast at said election for Ira E. Thomas for the office of county clerk of said county, in favor of and as if cast for a candidate other than for the said Ira E. Thomas;" with a similar charge of misreading 9 votes for the office of county treasurer, 10 votes for the office of sheriff, 5 votes for the office of superintendent of schools, and 5 votes for the office of county commissioner. Defendant was found guilty and sentenced to a fine of \$300 and imprisonment in the county jail for a period of three months, from which sentence and judgment he has prosecuted error to this court.

Plaintiff in error, whom we will designate as defendant, has assigned and discussed 12 separate assignments of error. Assignment No. 7 is, as stated by the attorney general, the main question in the case. Having reached the conclusion that this assignment is good, and that the judgment must be reversed for the error therein complained of, the other assignments argued will not be considered. This assignment alleges: "The court erred in permitting witnesses called on behalf of the state to testify orally, (a) whether or not plaintiff's exhibit 2 was similar to the ballot voted by them at the election in controversy; (b) for whom they voted for the several county offices in controversy; (c) as to how they marked the ballots cast by them; and (d) as to what tickets they voted, without the production of the ballots which would be the best evidence of such facts." Upon the trial the ballots were not produced, nor any reason given for not producing them. The

precinct poll book, a blank official ballot similar to those used at the election, and a card containing instructions to voters were introduced in evidence. The poll book shows that the total vote polled was 35. There were indorsed on the information the names of 42 witnesses, over half of whom were called to testify. The evidence shows that Frank Shank, Roy Barnett, and defendant acted as judges of the election, and S. S. Powell and Frank Wiley as clerks; that, a few minutes after the polls closed, the canvass of the vote was entered upon, the arrangement being that Barnett was to hand the ballots to defendant, defendant was to read them, Mr. Shank was to string them, and the clerks, Powell and Wiley, were to record the votes. The poll book showed that for sheriff W. M. Dennis received 10 votes; for county clerk Ira E. Thomas 4 votes; for county treasurer W. S. Britton 9 votes; for county superintendent Bessie V. Crews 17 votes; and for county commissioner E. D. Jones 19 votes. The contention of the state is that defendant fraudulently read the ballots so that Mr. Dennis received but 10 votes for sheriff, when he in fact received at least 18; that Mr. Thomas received but 4 votes for county clerk, when in fact he received at least 18; that Mr. Britton received but 9 votes for county treasurer, when in fact he received at least 17; that Bessie V. Crews received but 17 votes for superintendent, when in fact she received at least 19. The method pursued by the state in making its proof was by calling a large number of electors of Union precinct, exhibiting to each witness a blank copy of the official ballot used at the election, and then showing by the witness for whom he voted for the several offices above indicated.

The purpose of this testimony was to show that the ballots were not as read by defendant. If so, the best evidence of that fact would be the ballots themselves. The state quotes from *Wheat v. Ragsdale*, 27 Ind. 191: "If the ticket cast by the witness can be found and can be identified by him, it is the best evidence of the fact, but if the ticket cannot be found, or cannot be identified by the wit-

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ness, then it is competent for him to state for whom he voted;" and then argues that, "under the Australian ballot system, how can the ticket be identified by the voter? By law, he is prohibited from making any identification marks upon it." The fallacy of this argument is apparent. The ballots which defendant is charged with having misread were easy of identification. At least two of the judges of election are required to sign their names in ink upon the back of each ballot given to a voter when he presents himself at the booth. In the absence of any proof to the contrary, it must be presumed that the judges performed that duty. Hence, the identification of the ballots *en masse* was an easy matter. This is not a case of identifying a particular ballot cast by a particular voter, but it is simply the identification of the mass of ballots cast at an election, which, it is claimed, were misread by one of the judges. The undisputed evidence shows that the ballots were, as fast as counted, strung by one of the judges, tied to hold them in place, placed in a bag and the bag sealed by one of the members of the election board, taken by one of the members of the board and delivered to the county clerk, where, so far as the evidence in this record shows, they are still quietly reposing. If they have been destroyed or in any manner tampered with since the time when they were placed in that bag and the bag sealed, so as to render them unreliable as evidence or to cast doubt upon their being the particular ballots cast at the election, then the secondary evidence offered by the state would probably have been admissible. "What the law requires is the production of original evidence, the best evidence obtainable; secondary evidence being admissible only when for some reason primary evidence cannot be secured." *Donner v. State*, 69 Neb. 56. "Evidence cannot be received which, on its face, indicates that it is secondary and that the original source of information is in existence and accessible." *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713. "Before the contents of a written instrument can be established by oral testimony, the loss of the instrument must be ac-

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counted for." *Myers v. Bealer*, 30 Neb. 280. On page 287 of the opinion in the case last cited, it is said: "It does not appear that the paper is not in existence. It was left with the county judge, and he was not called to testify what search, if any, he had made for the missing paper. For all that appears from this record, it is where the county judge can place his hands upon it at any time. The person in whose custody the paper was left should have been called to establish that it was lost, before receiving oral testimony of its contents." The analogy between that case and this is perfect. The county clerk was not called to testify as to the whereabouts of the ballots. No evidence was offered to show why they were not produced. Their production, together with the poll book and the testimony of the other members of the election board, would have furnished a sure, safe and inexpensive method of proving or disproving the charge contained in the information, and would have saved the needless expense of calling in the large number of electors who voted at that election. At each attempt to offer this secondary evidence, proper objections were interposed by defendant. The objections should have been sustained.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

STATE, EX REL. NATIONAL EMPLOYEES ASSOCIATION, APPELLANT, v. SILAS R. BARTON, APPELLEE.

FILED DECEMBER 18, 1912. No. 17,806.

1. Insurance: STATUTORY PROVISIONS. The act of 1873 (Gen. St. 1873, ch. 33, p. 428), entitled "An act regulating insurance companies," applies to all kinds of insurance in this state, except life insurance, which is expressly omitted from the operation of that act.
2. ———: LICENSE. All companies whose object is to transact insurance business in this state must obtain license as the statute provides.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Harrison H. Bowes, for appellant.

Grant G. Martin, Attorney General, and *George W. Ayres*, contra.

SEDGWICK, J.

The relator alleges that it is incorporated under the general incorporation laws of the state, with a capital stock of \$10,000, \$5,100 of which is subscribed. The petition alleges: "The object of this association is to sell contracts to employees to compensate them when out of employment, by paying to them a percentage of the wages earned in their last place of employment, where such lack of employment arises from unavoidable causes, to be defined in the by-laws of this incorporation, upon a payment of this corporation of a certain stipulated sum per month to be provided in the by-laws; but no money shall be paid where the loss of employment is from lockouts, strikes, or incompetency; not more than 60 per cent. of the monthly salary or wages shall be paid under any contract, nor for a longer period than six months." It appears to be conceded that the object of this company is to transact a species of insurance. The company applied to the auditor for license to do business in the state, and was refused. Application was then made to the district court for Lancaster county for a mandamus to compel the auditor to issue the license. The writ was refused, and the relator has appealed.

Chapter 25 of the Revised Statutes of 1866 was entitled "Incorporations." It contained 144 sections. The first 14 sections related to insurance companies. Other classes of corporations were provided for, and then followed provisions applicable to corporations in general. Section 123 was as follows: "Any number of persons may be associated and incorporated for the transaction of any lawful

business, including the construction of canals, railways, bridges, and other works of internal improvement." This section has been retained unchanged, and is now section 123, ch. 16, Comp. St. 1911. Insurance companies were from the first required to file statements with the auditor and procure a license before doing business in the state. In 1873 the legislature passed an act entitled "An act regulating insurance companies." The first section provided: "That hereafter, when any number of persons associate themselves together for the purpose of forming an insurance company, for any other purpose than life insurance, under the provisions of chapter 25 of the revision of 1866, and all acts amendatory and supplementary thereto, they shall publish a notice of such intention, * * * and they shall also make a certificate under their hand, specifying * * * the amount of its capital stock," with other requirements. The third section provided: "No joint-stock company shall be incorporated under the provisions of this act, with a smaller capital than \$100,000, * * * of which capital at least 50 per cent. shall be fully paid up in cash." The first act was general and applied to all companies organized to do an insurance business in this state, and it seems clear that this act was intended to apply to all insurance companies other than life insurance. Section 8, as amended (Comp. St. 1911, ch. 43), contains nine subdivisions defining what it shall be lawful for companies organized under the act to do, followed by the general clause, "and generally to do and perform all other matters and things proper to promote these objects." Several sections of the general incorporation law are cited as showing that it is still contemplated that corporations organized for purposes not mentioned in the eighth section of the general insurance law may be incorporated under the general law. Section 20 provides that the proper officers of "each company organized under this act, or incorporated under any law of this state," shall make a statement to the auditor, etc.

Insurance companies had already been incorporated

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and were doing business in this state before the act of 1873, and it was not intended to compel them to be re-incorporated, but section 20 requires such companies to make statements to the auditor. There is therefore no implication that, after the act of 1873 went into operation, companies might be incorporated under some other law. The language of the act of 1873 is so plain and comprehensive as to admit of no doubt of its meaning. No insurance can be done in this state without a compliance with the statutes on that subject. If the ninth section of the act should be considered to prohibit such insurance as is contemplated by relator, and if such provision would be unconstitutional, no such questions are presented by this record.

The judgment of the district court is

AFFIRMED.

**APPEL MERCANTILE COMPANY, APPELLEE, v. PEARL BARKER,
APPELLEE; GRAND DRY GOODS COMPANY, APPELLANT.**

FILED DECEMBER 18, 1912. No. 16,865.

1. **Statutes: TITLES:** "BULK SALES LAW." Sections 31, 32, ch. 32, Comp. St. 1911, commonly known as the "Bulk Sales Law," are not unconstitutional as legislating upon a subject not clearly expressed in the title.
2. ———: ———: ———. The act makes all such sales void as to creditors, unless certain specified conditions are complied with. The conditions imposed cannot be considered as separate subjects of legislation, within the meaning of section 11, art. III of the constitution.
3. **Constitutional Law: DUE PROCESS OF LAW.** The act does not violate section 3, art. I of the constitution, which provides: "No person shall be deprived of life, liberty or property without due process of law."
4. ———: **CLASS LEGISLATION.** The act applies to all people of the

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state who engage in the business designated. The classification is not arbitrary and unreasonable, so as to make the act special or class legislation, forbidden by the constitution.

5. **Garnishment: PURCHASER OF MERCHANDISE IN BULK.** One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, in violation of the statute, will be held to be a trustee for the benefit of the creditors of his vendor, and liable as garnishee.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Stewart, Williams & Brown, for appellant.

R. H. Hagelin, Baldrige, De Bord & Fradenburg and McGilton, Gaines & Smith, contra.

SEDGWICK, J.

The plaintiff, having a judgment against the defendant, Pearl Barker, in the district court for Lancaster county, and an execution thereon having been returned wholly unsatisfied, caused the appellant, the Grand Dry Goods Company, to be summoned as garnishee. Mr. Dearsdorf, the president and general manager of the company, appeared and answered in the garnishment proceedings. Upon his answer the court ordered the garnishee to pay into court, to be applied upon plaintiff's judgment, the sum of \$831.89. From this order the garnishee has appealed.

It appeared from the answer of Mr. Dearsdorf that a few days before the garnishment proceeding the defendant, Pearl Barker, was carrying on a retail millinery business in Lincoln, and made a contract of exchange of her stock of millinery goods to this appellant for a quarter section of land in Lincoln county. The value of the stock of goods was stated in the exchange as \$2,200, and was in fact something over \$1,000. The appellant took possession of the goods and disposed of them. The land exchanged was not conveyed by the appellant, but the title

was held until such time as the defendant, Pearl Barker, should pay her commercial indebtedness. The provisions of the statute, commonly known as the "Bulk Sales Law" (Comp. St. 1911, ch. 32, secs. 31, 32), were not complied with in making the exchange, and the court held that the transfer of the stock of goods was void as against creditors, and ordered the garnishee to pay the value thereof into court to be applied on the judgment. The garnishee insists that this order is erroneous, because the bulk sales law is unconstitutional for several reasons, and because the garnishee was entitled to trial by jury, and the summary order of the court was erroneous. The statute in question was before this court in *Lee v. Gillen & Boney*, 90 Neb. 730, and it was assumed to be constitutional and valid. The question of its constitutionality, however, was not determined or considered, and, the property transferred not being merchandise, within the meaning of the statute, it was held that the statute had no application to the transaction then being considered. It was therefore unnecessary to consider the constitutionality of the act.

1. The first objection made in this case to the constitutionality of the statute is that the statute is broader than the title; that is, that the subject of legislation is not clearly expressed in the title, as required by section 11, art. III of the constitution. The title of the act is "An act to declare void sales, trades or other disposition of stocks of merchandise or portions thereof in bulk, otherwise than in the ordinary and regular course of the seller's business." Laws 1907, ch. 62. The act consists of two sections, and is as follows:

"Section 31. The sale, trade or other disposition in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the seller and purchaser, at least five days before the sale, trade or other disposition, make a full detailed inventory,

showing the quantity and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, trade or other disposition; and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller, under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall, at least five days before taking possession of such merchandise, or paying therefor, notify personally, or by registered mail, every creditor whose name and address are stated in said list, of the proposed sale, trade or other disposition and of the price, terms and conditions thereof; provided, that at least five (5) days before the sale, trade or other disposition, the seller may file with the county clerk in the county in which the stock is located, an agreement with all his creditors waiving the inventory and notice above required.

"Section 32. Nothing contained in this act shall apply to sales by executors, administrators, receivers or by any public officer under judicial process."

The purpose of the constitutional provision in question is to prevent surreptitious legislation. The title of an act of the legislature must be such as to give reasonable notice to the members of the legislature, and others interested, of the general subject upon which it is proposed to legislate. Some of the earlier decisions of this court which are cited in the brief construed this constitutional provision very strictly. We do not consider it necessary to go further in that direction than this court has already gone. The presumption in favor of the validity of an act of the legislature is very strong, and, unless the conclusion is unavoidable that the subject of legislation is not included in the title of the act, the statute will not be considered void for that reason. Some courts, even in recent years, have applied this provision technically and, we think, too strictly. The subject of legislation expressed in the

title of our act is: "To declare void sales, transfers or other disposition of merchandise or portions thereof in bulk." And the act itself provides that all sales in bulk shall be void, as against the creditors of the seller, under certain circumstances and conditions. The complaint really is that the legislature did not go so far in declaring sales void as it might have done under the title of the act. The greater includes the less, and this title is ample notice that it was intended to limit the right to make valid sales of merchandise in bulk. The legislature has not done more in this respect than the title would justify. The fact that it has done less surely will not invalidate the act.

2. It is said in the brief that the act has more than one subject, and so violates the constitutional provision cited; that the title to declare sales void will not cover a provision regulating valid sales. This objection seems to be without any force. The act declares sales of merchandise in bulk void, with certain specified exceptions. The fact that the act does not go as far as the title, that, instead of making all sales under all circumstances void, it makes certain sales under certain circumstances void, prescribing certain conditions to be complied with in order to make a valid sale, does not make the specified conditions a distinct subject of legislation.

3. It is said that the act is unconstitutional because it deprives persons of their property without due process of law, in violation of section 3, art. I of the constitution.

In *Everett Produce Co. v. Smith*, 2 L. R. A. n. s. 331 (40 Wash. 566) several cases are reported from different states upon this interesting question. A footnote is appended, from which it appears that the earliest legislation in this country upon the subject of bulk sales of goods was the act of Louisiana, in 1896. This note appears to have been written in 1905, and it is said that at that time 22 of the states and territories had enacted such legislation. The courts have not been entirely agreed as to the validity of the various statutes. The courts which have held such legislation constitutional appear generally to agree with

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the supreme court of Washington, which used the following language: "It was intended to prevent retail dealers in goods, wares, and merchandise from defrauding their creditors. As such, it is among the undoubted subjects of legislation; and the real question to be considered, therefore, is: Is the act so far an abuse of the power of legislation as to take it out of the rule of due process of law? In our opinion, it is not. It is a general rule that, when the business is a proper subject of police regulation, the legislature may, in the exercise of that power, adopt such measures as they see fit to correct the existing abuses, so long as the measures adopted have relation to and a tendency to accomplish the desired end, and violate no direct constitutional provision. This act is within the rule. That it has relation to and will tend to prevent the particular frauds aimed at cannot be doubted. Nor is there any direct constitutional provision against the enactment of such laws. Whether the act is more harsh than was necessary, or whether it is not the wisest or best that could have been adopted, are legislative questions, with which the courts have nothing to do. It is enough for the court to know that the act is within the legislative power." *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549. Our statute is new, and if it is found in any respect to be defective, or any of its provisions are harsh and unreasonable, the legislature will, of course, remedy the matter. It is not necessary in this case to construe the various provisions of the statute. If some of them should be found for any reason to be invalid, that would not necessarily render the whole act unconstitutional.

4. The statute is not unconstitutional as being special or class legislation. "A law which is uniform in its operation is not rendered invalid merely because of the limited number of persons who will be affected by it. The act in question applies equally to all the people of the state who may engage in the business described. The limitation of the act to retail dealers is not an arbitrary classification." *Walp v. Moor*, 76 Conn. 515, 57 Atl. 277.

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5. The final contention of the appellant is that garnishment proceedings will not lie in such a case. This objection has been, we think, well answered by the supreme court of Washington, in *Kohn v. Fishbach*, 36 Wash. 69. The circumstances seem to be similar with those in this case, and the court said: "It is true * * * that he did not at that time have any of the property of the defendant in his possession, and that he was not indebted to him. But, in contemplation of law, he had the property of the defendant in his hands, because, having purchased the property in fraud of law, without complying with the provisions of the law in relation to sales of property in bulk, he stood in the position of a trustee of the property, responsible to the *cestui que trust* or the creditors for the disposition of such property." In the case at bar the garnishee appears to have protected itself in the possession of this stock of goods. It still holds the title to the land, and its contract provides that the title shall not be conveyed until the creditors are paid.

The judgment of the district court is

AFFIRMED.

ALPHIA M. SHEVALIER, APPELLANT, v. ELMER B. STEPHENSON, ADMINISTRATOR, ET AL.; MARGARET A. MILLIKEN, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,874.

1. **Appeal: REFUSAL OF CONTINUANCE.** Alleged errors of the trial court in refusing a continuance will not be considered upon plaintiff's appeal, when the plaintiff, after such continuance was refused, dismissed her action, and the cause was afterwards tried solely upon the cross-petition of one of the defendants, and no further application was made for a continuance and no showing of any necessity for a continuance upon the trial of the issue presented in the cross-petition.
2. ———: **SUIT IN EQUITY: EVIDENCE.** The rule that, upon appeal in an action in equity tried before the judge of the district court, it will be presumed that the court decided the case solely upon

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competent evidence, and that no alleged errors in receiving incompetent testimony will be considered in this court, is well established and never departed from.

3. **Injunction: MULTIPLICITY OF SUITS.** A court of equity may enjoin a plaintiff from bringing successive actions for the same alleged cause against the same parties. If such action is begun and, when ready for trial upon issues joined, is dismissed by plaintiff, and immediately recommenced and again dismissed by plaintiff when ready for trial after the issues have been made by the parties, another action for the same alleged cause against the same parties should be enjoined, in the absence of any evidence of good faith on the part of the plaintiff in so doing.
4. ———: ———. If an action at law has proceeded to judgment, and one of the parties afterwards brings successive vexatious suits in equity to obtain a new trial, dismissing her case and immediately recommencing it, the defendant will not be required to further establish her legal rights in the controversy before obtaining upon cross-petition in the action in equity an injunction restraining the plaintiff from further dismissing and recommencing such action.
5. **Equity: RELIEF.** When a court of equity has taken jurisdiction of the principal matter in controversy between the parties, it will dispose of the whole matter, and prevent further unnecessary litigation.
6. **Judgment: RES JUDICATA: PARTIES.** A decree in equity is binding only upon parties to the action; but the matters determined by the decree cannot again be litigated against a party to the trial on the ground that she is jointly liable with others who were dismissed from the action before trial.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Minor S. Bacon, for appellant.

Tibbets & Anderson and *F. B. Baylor*, *contra*.

SEDGWICK, J.

When Helen Horn died, in 1907, she left real estate of the value of something more than \$20,000 and some personal property. This plaintiff presented to the county court of Lancaster county an alleged will of Mrs. Horn,

giving her property to this plaintiff and another. Upon contest in that court, probate was allowed, and the heirs of Mrs. Horn, Margaret A. Milliken, Jennie E. Foley, and Mary K. Nichols, appealed to the district court. While the contest was being tried in that court, the heirs claimed that this plaintiff had taken several thousand dollars of money, belonging to the estate, and other personal property, and caused her to be arrested upon a charge of larceny. Several thousand dollars were found upon her person. Thereupon, through the plaintiff's attorney, purporting to act for her, a settlement of the matter was made with the heirs. The money was assigned to plaintiff's attorney, and by him to the administrator of the estate, and a judgment was entered determining the contest in favor of the heirs. The plaintiff afterwards brought this action in equity in the district court for Lancaster county to obtain a new trial of the will contest, and to recover the money taken from her person while under arrest, and assigned by her to the administrator in the said settlement. In her petition she alleges that the settlement of the controversy which resulted in the judgment against her in the contest proceedings was obtained by duress, and the fraud and misconduct of her attorney conniving and conspiring with those interested to defeat her. She made the three heirs of Mrs. Horn, the administrator of the estate, the police officers who participated in her arrest, and her attorney, who represented her in the contest proceedings and in the settlement, defendants in this suit.

Mrs. Milliken, as one of the heirs, answering, denied the principal allegations of the plaintiff's petition, but admitted the transfer of the money to the administrator and the settlement of the contest proceedings through the plaintiff's attorney, and, as cross-petition against the plaintiff, alleged that in September, 1908, which was about 18 months before this action was begun, this plaintiff began an action in the district court for Lancaster county against these same defendants, "in which the same matters

and facts were set forth in the petition as are set forth in the petition herein," and that, when issues were joined in that case and the same was ready and argued, the plaintiff dismissed the action, and immediately began another action against the same defendants, and filed a petition which was an exact copy of the petition in the former case, and that, after issues were duly joined in the second action and the case ready for trial, the plaintiff dismissed the action, without prejudice, and immediately filed the petition in this action, which is an exact copy of the former petitions. She also alleged the interest of the answering defendant in the property of the estate and the value of the property, and that these repeated actions prevented a settlement of the estate, clouded the defendant's title in the real estate, and caused the defendants great and unnecessary expense and annoyance, and that the actions were brought by the plaintiff without any desire or intention of obtaining a trial and determination of the issue so presented, but for the sole purpose of "harrassing and embarrassing this defendant and her co-heirs from disposing of said real estate and to cast a cloud upon the title of the same." The prayer of the cross-petition was that the plaintiff be enjoined from harrassing defendant "with actions based upon the allegations contained in the petition herein, and that she be enjoined from prosecuting any action looking toward the setting aside of the judgment rendered against the said plaintiff" in the will contest. The trial court found the issues in favor of the defendant and enjoined the plaintiff as prayed, and the plaintiff has appealed.

1. The action of the trial court first complained of is in refusing a continuance of the case upon application of the plaintiff. This application was based upon the absence of a witness and was supported by an affidavit, but the matters that it was supposed the witness would testify to were not stated in the affidavit, and, after the court had overruled the application, the plaintiff dismissed her action as to all the defendants; but, upon the objection of

the cross-petitioner, the court refused to dismiss the cross-petition and proceeded to the trial of the issues so joined. No further application for a continuance was made, and it is clear that the plaintiff cannot now avail herself of any supposed errors of the court in refusing the continuance. There is nothing in the record to show that any continuance was necessary, or was supposed to be necessary, upon the hearing of this defendant's cross-petition.

2. The plaintiff complains of the rulings of the court in admitting evidence, and in allowing too much latitude to defendant's attorney in cross-examining the plaintiff, and in other similar matters; but in a trial to the court, and especially in an equity case, the court is supposed to base its judgment upon the competent evidence produced, and, if evidence which was properly introduced will support the judgment, error in allowing incompetent evidence or cross-examination will not be considered.

3. It is insisted that the evidence does not support the decision, and that an action to enjoin the commencement of further suits, under the circumstances, cannot be maintained. The plaintiff in the brief says: "We maintain that we have the right to dismiss a suit, either in equity or at law, without prejudice to a new action, and immediately refile the same suit, against the same parties, concerning the same subject matter, asking the same relief, when the suit has not been fully and legally adjudicated between the parties. It has been held that this right continued as long as there is the right to submit the cause on its merits." *Thornhill v. Hargreaves*, 76 Neb. 582, is cited as supporting this doctrine. That was a proceeding to revive a dormant judgment begun in the county court, and after having appealed to the district court the plaintiff dismissed the proceedings. He afterwards begun new proceedings to revive the judgment, and the former action and the dismissal thereof were relied upon as a bar to the new proceedings. The court held that the plaintiff had a right to dismiss his action in the district court, without prejudice, and after such dismissal another action might

be begun. The questions here presented were not involved in that case, and there is nothing in the opinion that supports the plaintiff's contention.

When a plaintiff seeks to enjoin a multiplicity of suits, and relies upon an alleged right as between himself and the defendant as the basis of his action—that is, if his right of action depends upon his title to certain real estate or upon his ownership and right of possession of certain personal property, and that title or that ownership and right of possession is contested and doubtful—it has been frequently held that he must first establish that right in an action at law before he can maintain his action in equity to prevent further litigation. If this rule obtains where there is no distinction between the procedure in an action at law and in actions in equity, as in the code states generally, and if the application of the rule might in an action in equity depend upon the circumstances of the particular case, it seems clear that the rule has no application in the case at bar. The principal contention between these parties was as to the probate of the proposed will. That issue had been determined in an action at law. If a party could bring successive actions for the same cause, and successively dismiss and again begin the action, the rights of the parties would never be determined in actions so brought and dismissed, and there would, under plaintiff's contention, never be a time when the court could stop such proceedings.

The plaintiff says that she was prevented from having the issues she desired to present determined because of the unjust and erroneous rulings of the court in refusing continuances, and otherwise preventing a fair trial, and so compelling her to dismiss the successive suits. Errors of law committed by the trial court prejudicial to the rights of a litigant cannot ordinarily be corrected by another suit in the same court. The remedy is by appeal; and, unless appealed from, such rulings must be regarded as right. Any attempt to correct such rulings except by appeal is usually regarded as a collateral attack. We

must therefore consider that the plaintiff dismissed her cases voluntarily, and without any ground for so doing except to serve her own purposes. Under such circumstances, the plaintiff would be required to produce evidence to convince a court of equity that she was attempting in good faith to procure a fair trial upon the merits of her claim. The plaintiff used the same allegations in each case begun by her. The petition in this case shows that it was verified long before the former case was dismissed. Whenever it was thought that the action which she had pending was about to be brought to trial, she was already prepared with a duplicate of the petition, and, when the matter could no longer be delayed in court, her action was dismissed, and immediately the same action, substantially, begun again. The brief is quite voluminous, but it does not point out any evidence in the record that would explain or justify her motive in so proceeding. It is true that there had been no adjudication as to the plaintiff's right to the money that she assigned to the estate, and as to the validity of that assignment; but if the contest of the will was the main issue between the parties, and if the rights of the respective parties in that issue had been fully determined, as we have seen, in an action of law, a court of equity, having taken jurisdiction of the principal controversy, ought at the same time to determine the whole matter.

4. The plaintiff insists that, as her action was dismissed as against the other two heirs and all other defendants, the court was without jurisdiction to enjoin the plaintiff from proceeding against the other defendants. The decree was "that the plaintiff be, and she is hereby, permanently enjoined from prosecuting or instituting any further action for the recovery of the \$5,100, or for the setting aside of the decree of the district court rendered in the matter of the estate of Helen A. Horn, deceased, wherein the probate of the will proposed by the plaintiff, Alpha M. Shevaller, was denied, and from instituting, prosecuting or furthering any actions including said matters." This is

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perhaps the usual form in such cases, and is, of course, binding only upon the parties thereto. It enjoined the plaintiff from bringing any more actions of the same nature against the cross-petitioner, or that will affect the interests of the cross-petitioner in adjusting and distributing the estate in question. There is no doubt that the court had jurisdiction to adjudicate all the interests of the plaintiff against this cross-petitioner in the matters involved in litigation, and we do not see that the decree has gone further than necessary for that purpose.

We think the judgment of the district court is supported by the evidence, and it is

AFFIRMED.

REESE, C. J., having been of counsel in a former stage of this litigation, took no part in this decision.

ROSE, J., took no part in the decision.

WILLOW SPRINGS BREWING COMPANY, APPELLANT, v.
HORATIO G. NEWCOMB, APPELLEE.

FILED DECEMBER 18, 1912. No. 16,887.

1. **Intoxicating Liquors: LICENSE.** A saloon license purporting to be issued to a deceased person in the company name used by such person in his lifetime is invalid for any purpose.
2. **Principal and Agent: PURCHASE OF LIQUORS: LIABILITY OF AGENT.** One who assumes to act as agent for the estate of a deceased person in conducting a saloon and in purchasing liquors for that purpose, without any authority from the probate court so to do, and without any valid license, is personally liable for the contract price of the liquors so purchased, in the absence of an express agreement that he should not be so held.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Reversed.*

I. J. Dunn, A. M. Morrissey and Allen G. Fisher, for appellant.

J. E. Porter, contra.

SEDGWICK, J.

For some time prior to the 18th day of March, 1908, H. C. Armstrong resided in Sheridan, Wyoming, and owned a saloon and saloon business in Crawford, Nebraska. The business was carried on in the name of H. C. Armstrong & Company, by this defendant as agent for Armstrong. The saloon license was obtained and held in the name of H. C. Armstrong & Company. On the 18th day of March, 1908, Armstrong died, and this defendant continued to carry on the business as before. Mrs. Armstrong was appointed administratrix of his estate, and this plaintiff continued to sell beer and other liquors, upon the order of this defendant, as he had done prior to the death of Mr. Armstrong, except that before Mr. Armstrong's death he charged the account of Armstrong & Company, and soon after he began charging the goods to the defendant individually. In November, following, an order of the probate court was obtained for that purpose, and the saloon business, with the supplies on hand, were sold by the administratrix to this defendant, who still continued to conduct the business for the remainder of the fiscal year under the license in the name of H. C. Armstrong & Company. This action was brought to recover for liquors sold after Mr. Armstrong's death, and before the sale of the business to this defendant by the administratrix. The district court instructed the jury to find a verdict for the defendant, and the plaintiff has appealed.

There is but little conflict in the evidence; and, since the court has instructed the verdict, we must consider the facts to be as testified to by the plaintiff. Mr. Moise, who represented the plaintiff's company in this business, testified that he was present at the funeral of Mr. Armstrong,

and in a conversation with the defendant suggested the fact that the Armstrong estate would not be liable for goods purchased by the defendant, and that the plaintiff would be compelled to look to the defendant for pay. This is denied by the defendant. The fact that Mr. Armstrong resided in another state, and that there was no license, while Mr. Armstrong lived, in the name of any responsible individual, and that, for these reasons, the supposed license was probably invalid for any purpose even before the death of Mr. Armstrong, are matters discussed quite at large in the briefs. The defense relied upon in this case is that the defendant bought the goods, not for himself, but as agent for the estate of H. C. Armstrong, deceased. If it were possible that the estate of a deceased person could lawfully carry on a saloon business in this state, still the evidence in this case is by no means conclusive that the estate undertook to do so. It is not generally supposed that the administrator of an estate can carry on any trade or business in behalf of the estate, except temporarily and under peculiar circumstances, and with the express authorization of the probate court so to do. Obtaining a liquor license and carrying on a saloon business are in this state peculiarly personal matters, and the probate court would not authorize an individual to carry on such business in a fictitious name at the risk of the estate of a deceased person. It is clear that in this case the estate would not be liable for these goods and that this claim could not be collected from the administratrix. In other words, it is impossible that the estate of Armstrong could have been the principal in the transaction of this business. If this defendant bought these goods as agent, and so is not personally liable, then he was in fact agent for no one, and no one is liable. It appears that Mr. Moise knew that Armstrong was deceased, and in all probability knew that this defendant was assuming to continue the business in the interests of the estate of the deceased, but this would not relieve this defendant from liability. "One who, as agent, assumes to represent a

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principal who has no legal existence or status is himself liable." *Learn v. Upstill*, 52 Neb. 271; *Codding v. Munson*, 52 Neb. 580. It is said in the opinion in the latter case that one who assumes to act as agent for a person having no legal status is liable, "unless the agreement was that (the party with whom he contracted) was to look solely to" some other party or fund. In this case there was no other party that could be held legally liable for these goods, and there is no evidence of any express agreement on the part of the plaintiff to look solely to this estate for the price of the goods. Under this evidence, we think the district court should have instructed the jury to find a verdict for the plaintiff.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

JACOB MAJERUS, APPELLEE, V. HENRY C. BARTON,
APPELLANT.

FILED DECEMBER 18, 1912. No. 16,736.

Easements: PRESCRIPTION: ROADWAY. Where there has been an open, visible, continuous and unmolested use of a roadway across the premises of another for a period exceeding ten years, it will be presumed to be under a claim of right, and not by the license of the owner; and, where one seeks to close a way over his land which has been enjoyed by his neighbor for such period, he has the burden of showing that the use was permissive, and not under a claim of right, and, if he fails to overcome such presumption by a preponderance of the evidence, his case must fail.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Reavis & Reavis, for appellant.

C. Gillespie and E. Falloon, contra.

HAMER, J.

This is an appeal from a decree of the district court for Richardson county. The plaintiff, appellee, seeks to establish a roadway between his premises, the north half of the southwest quarter of section 12, in township 1, in range 16, Richardson county, Nebraska, and a public road running along the south line of the 80-acre tract adjoining on the south. The plaintiff and his grantors have owned the 80-acre tract in question for a period of about 40 years, and during that time they have traveled to and from the same along the west line of the south eighty to the public road. The right to use this roadway is claimed by prescription. A good many years ago a row of walnut trees was planted within the roadway, and about 7 or 8 feet from a hedge fence on the east side of the said roadway. About 3 years ago a wire fence was built about 6 feet west of the said row of trees. The fence and the row of trees run north and south the full length of the roadway. It is alleged in the petition that the limbs of the walnut trees grew so that they reached over the roadway and prevented the plaintiff from hauling hay and interfered with driving a covered carriage over the same, and, because of the limbs and the fence, it was almost impossible to get through, and especially when the road was wet and muddy; that the plaintiff had asked the defendant to remove his fence and to allow the trees to be trimmed and the rubbish accumulated to be taken out of the roadway, and that the defendant refused to permit this to be done; that, because of the fence and the walnut trees, the plaintiff was prevented from enjoying the free and undisturbed use of such way. The plaintiff alleged in his petition that the west 30 feet of the defendant's tract had been charged with and had become subservient to the easement of the said roadway for an uninterrupted period of 40 years; that the plaintiff and his grantors had been in the open and notorious use of said easement for that time; that the grantors of the defendant admitted that the ownership to said land covered by

said easement belonged to the plaintiff's grantors; that the plaintiff had been damaged in the premises in the sum of \$50. There was a prayer for judgment for \$50 and costs; that the defendant be ordered to take down the fence; that the use of the roadway of 30 feet be quieted in the plaintiff; and that the plaintiff be permitted to clear the said roadway of all obstructions.

A general demurrer to the plaintiff's petition was overruled, and the defendant answered admitting the ownership, but denied that there was an easement, and alleged that there was a strip of ground approximately 30 feet wide on the west end of the defendant's land which ran north and south leading to the public road from the plaintiff's land, and that the defendant had permitted the plaintiff to go over and upon said strip and to use the same in connection with the defendant and others as a roadway, but that the permission was a mere license granted by the defendant to the plaintiff in common with others; that the defendant was the owner of the row of walnut trees, and that he constructed and maintained a wire fence a few feet west of said trees, that no rights to the said strip had ever been granted to the plaintiff, or had inured to his benefit by prescription, or otherwise; that the plaintiff had due notice that his grantors had no right to said strip of ground, except the right given them by way of license or permission to use the same as a roadway in common with others; that the plaintiff had always recognized the ownership of the land in the defendant; that about the 7th of October, 1906, the plaintiff sought to purchase of the defendant enough of said right of way to give him a road thereon, and offered the defendant \$112.50 for the same. Other allegations in the petition were denied.

There was a reply alleging said easement was the only way the plaintiff had of getting to and from the public road; that after the dispute arose plaintiff offered the defendant by way of compromise \$125 for the easement; that the offer was made to avoid a lawsuit and trouble

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and facts were set forth in the petition as are set forth in the petition herein," and that, when issues were joined in that case and the same was ready and argued, the plaintiff dismissed the action, and immediately began another action against the same defendants, and filed a petition which was an exact copy of the petition in the former case, and that, after issues were duly joined in the second action and the case ready for trial, the plaintiff dismissed the action, without prejudice, and immediately filed the petition in this action, which is an exact copy of the former petitions. She also alleged the interest of the answering defendant in the property of the estate and the value of the property, and that these repeated actions prevented a settlement of the estate, clouded the defendant's title in the real estate, and caused the defendants great and unnecessary expense and annoyance, and that the actions were brought by the plaintiff without any desire or intention of obtaining a trial and determination of the issue so presented, but for the sole purpose of "harrassing and embarrassing this defendant and her co-heirs from disposing of said real estate and to cast a cloud upon the title of the same." The prayer of the cross-petition was that the plaintiff be enjoined from harrassing defendant "with actions based upon the allegations contained in the petition herein, and that she be enjoined from prosecuting any action looking toward the setting aside of the judgment rendered against the said plaintiff" in the will contest. The trial court found the issues in favor of the defendant and enjoined the plaintiff as prayed, and the plaintiff has appealed.

1. The action of the trial court first complained of is in refusing a continuance of the case upon application of the plaintiff. This application was based upon the absence of a witness and was supported by an affidavit, but the matters that it was supposed the witness would testify to were not stated in the affidavit, and, after the court had overruled the application, the plaintiff dismissed her action as to all the defendants; but, upon the objection of

the cross-petitioner, the court refused to dismiss the cross-petition and proceeded to the trial of the issues so joined. No further application for a continuance was made, and it is clear that the plaintiff cannot now avail herself of any supposed errors of the court in refusing the continuance. There is nothing in the record to show that any continuance was necessary, or was supposed to be necessary, upon the hearing of this defendant's cross-petition.

2. The plaintiff complains of the rulings of the court in admitting evidence, and in allowing too much latitude to defendant's attorney in cross-examining the plaintiff, and in other similar matters; but in a trial to the court, and especially in an equity case, the court is supposed to base its judgment upon the competent evidence produced, and, if evidence which was properly introduced will support the judgment, error in allowing incompetent evidence or cross-examination will not be considered.

3. It is insisted that the evidence does not support the decision, and that an action to enjoin the commencement of further suits, under the circumstances, cannot be maintained. The plaintiff in the brief says: "We maintain that we have the right to dismiss a suit, either in equity or at law, without prejudice to a new action, and immediately refile the same suit, against the same parties, concerning the same subject matter, asking the same relief, when the suit has not been fully and legally adjudicated between the parties. It has been held that this right continued as long as there is the right to submit the cause on its merits." *Thornhill v. Hargreaves*, 76 Neb. 582, is cited as supporting this doctrine. That was a proceeding to revive a dormant judgment begun in the county court, and after having appealed to the district court the plaintiff dismissed the proceedings. He afterwards begun new proceedings to revive the judgment, and the former action and the dismissal thereof were relied upon as a bar to the new proceedings. The court held that the plaintiff had a right to dismiss his action in the district court, without prejudice, and after such dismissal another action might

be begun. The questions here presented were not involved in that case, and there is nothing in the opinion that supports the plaintiff's contention.

When a plaintiff seeks to enjoin a multiplicity of suits, and relies upon an alleged right as between himself and the defendant as the basis of his action—that is, if his right of action depends upon his title to certain real estate or upon his ownership and right of possession of certain personal property, and that title or that ownership and right of possession is contested and doubtful—it has been frequently held that he must first establish that right in an action at law before he can maintain his action in equity to prevent further litigation. If this rule obtains where there is no distinction between the procedure in an action at law and in actions in equity, as in the code states generally, and if the application of the rule might in an action in equity depend upon the circumstances of the particular case, it seems clear that the rule has no application in the case at bar. The principal contention between these parties was as to the probate of the proposed will. That issue had been determined in an action at law. If a party could bring successive actions for the same cause, and successively dismiss and again begin the action, the rights of the parties would never be determined in actions so brought and dismissed, and there would, under plaintiff's contention, never be a time when the court could stop such proceedings.

The plaintiff says that she was prevented from having the issues she desired to present determined because of the unjust and erroneous rulings of the court in refusing continuances, and otherwise preventing a fair trial, and so compelling her to dismiss the successive suits. Errors of law committed by the trial court prejudicial to the rights of a litigant cannot ordinarily be corrected by another suit in the same court. The remedy is by appeal; and, unless appealed from, such rulings must be regarded as right. Any attempt to correct such rulings except by appeal is usually regarded as a collateral attack. We

must therefore consider that the plaintiff dismissed her cases voluntarily, and without any ground for so doing except to serve her own purposes. Under such circumstances, the plaintiff would be required to produce evidence to convince a court of equity that she was attempting in good faith to procure a fair trial upon the merits of her claim. The plaintiff used the same allegations in each case begun by her. The petition in this case shows that it was verified long before the former case was dismissed. Whenever it was thought that the action which she had pending was about to be brought to trial, she was already prepared with a duplicate of the petition, and, when the matter could no longer be delayed in court, her action was dismissed, and immediately the same action, substantially, begun again. The brief is quite voluminous, but it does not point out any evidence in the record that would explain or justify her motive in so proceeding. It is true that there had been no adjudication as to the plaintiff's right to the money that she assigned to the estate, and as to the validity of that assignment; but if the contest of the will was the main issue between the parties, and if the rights of the respective parties in that issue had been fully determined, as we have seen, in an action of law, a court of equity, having taken jurisdiction of the principal controversy, ought at the same time to determine the whole matter.

4. The plaintiff insists that, as her action was dismissed as against the other two heirs and all other defendants, the court was without jurisdiction to enjoin the plaintiff from proceeding against the other defendants. The decree was "that the plaintiff be, and she is hereby, permanently enjoined from prosecuting or instituting any further action for the recovery of the \$5,100, or for the setting aside of the decree of the district court rendered in the matter of the estate of Helen A. Horn, deceased, wherein the probate of the will proposed by the plaintiff, Alpha M. Shevalier, was denied, and from instituting, prosecuting or furthering any actions including said matters." This is

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perhaps the usual form in such cases, and is, of course, binding only upon the parties thereto. It enjoined the plaintiff from bringing any more actions of the same nature against the cross-petitioner, or that will affect the interests of the cross-petitioner in adjusting and distributing the estate in question. There is no doubt that the court had jurisdiction to adjudicate all the interests of the plaintiff against this cross-petitioner in the matters involved in litigation, and we do not see that the decree has gone further than necessary for that purpose.

We think the judgment of the district court is supported by the evidence, and it is

AFFIRMED.

REESE, C. J., having been of counsel in a former stage of this litigation, took no part in this decision.

ROSE, J., took no part in the decision.

**WILLOW SPRINGS BREWING COMPANY, APPELLANT, v.
HORATIO G. NEWCOMB, APPELLEE.**

FILED DECEMBER 18, 1912. No. 16,887.

1. **Intoxicating Liquors: LICENSE.** A saloon license purporting to be issued to a deceased person in the company name used by such person in his lifetime is invalid for any purpose.
2. **Principal and Agent: PURCHASE OF LIQUORS: LIABILITY OF AGENT.** One who assumes to act as agent for the estate of a deceased person in conducting a saloon and in purchasing liquors for that purpose, without any authority from the probate court so to do, and without any valid license, is personally liable for the contract price of the liquors so purchased, in the absence of an express agreement that he should not be so held.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Reversed.*

I. J. Dunn, A. M. Morrissey and Allen G. Fisher, for appellant.

J. E. Porter, contra.

SEDGWICK, J.

For some time prior to the 18th day of March, 1908, H. C. Armstrong resided in Sheridan, Wyoming, and owned a saloon and saloon business in Crawford, Nebraska. The business was carried on in the name of H. C. Armstrong & Company, by this defendant as agent for Armstrong. The saloon license was obtained and held in the name of H. C. Armstrong & Company. On the 18th day of March, 1908, Armstrong died, and this defendant continued to carry on the business as before. Mrs. Armstrong was appointed administratrix of his estate, and this plaintiff continued to sell beer and other liquors, upon the order of this defendant, as he had done prior to the death of Mr. Armstrong, except that before Mr. Armstrong's death he charged the account of Armstrong & Company, and soon after he began charging the goods to the defendant individually. In November, following, an order of the probate court was obtained for that purpose, and the saloon business, with the supplies on hand, were sold by the administratrix to this defendant, who still continued to conduct the business for the remainder of the fiscal year under the license in the name of H. C. Armstrong & Company. This action was brought to recover for liquors sold after Mr. Armstrong's death, and before the sale of the business to this defendant by the administratrix. The district court instructed the jury to find a verdict for the defendant, and the plaintiff has appealed.

There is but little conflict in the evidence; and, since the court has instructed the verdict, we must consider the facts to be as testified to by the plaintiff. Mr. Moise, who represented the plaintiff's company in this business, testified that he was present at the funeral of Mr. Armstrong,

land, and locked the gate, which the defendant took off its hinges, and went through and the plaintiff brought his action of trespass. Defendant proved the use of the way for 40 years, also that defendant had said to the plaintiff that plaintiff was very kind to allow him a way over the land, and had spoken of purchasing a right of way out from his place. There was a verdict for the defendant, and the court held that the owner of the land "has the burden of proving that the use of the easement was under some license, indulgence, or special contract, inconsistent with the right claimed by the other party," but said, "we do not think the owner made such proof here," and affirmed the judgment of the court below.

The easement is a right which one person has to use the land of another for a specific purpose. *Jackson v. Trullinger*, 9 Or. 393, 397.

The following authorities seem to sustain the appellee's contention: *Steffy v. Carpenter*, 37 Pa. St. 41; *Colburn v. Marsh*, 22 N. Y. Supp. 990; *Nicholls v. Wentworth*, 100 N. Y. 455; *Barnes v. Haynes*, 13 Gray (Mass.) 188, 74 Am. Dec. 629. Nor need there be an allegation that the user was adverse, where it is set forth that the plaintiff used the roadway continuously for 50 years with the knowledge and acquiescence of the owner.

The way is in a lane between two hedge fences, one of which is on the Bowers land and the other on the Barton land. Not only is the place between the hedges the right sort of place for a road, but the defendant's grantors planted a row of walnut trees, such as is usually planted to line a road. The acts of defendant's grantors were such as to indicate their intention to leave a roadway. They seem to have acquiesced in the demand of the owner of the north eighty for a road across the south eighty. It was a necessity to him, and it requires no flight of imagination to suppose that he demanded that which made it possible for him to live there in comfort. If the owner of the south eighty yielded, however slightly, to the demands of the occupant of the north eighty, and so far consented

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that the occupant used the roadway until 40 years elapsed, the present owner of the south eighty has assumed a serious and difficult burden of proving that the use for all of these 40 years was merely permissive. Besides, the limbs of the overhanging trees and the weeds have been cut out of the roadway from time to time by the defendant himself, and he has kept the roadway open, assisted by the appellee. There is testimony that the defendant left it open as an accommodation to the neighbors. He gives this testimony himself. What does he intend to establish by keeping it open if it is not a roadway? It is not to be forgotten that this lane is on a section line. Neither is it to be forgotten that the legislature did declare that section lines were to be public roads. It may be true that they are not public roads until they are opened, but it is probably a common belief that they are public roads, and there is nothing strange in the testimony of Messler, who describes the dispute that was had, and he tells how Wyatt, McDowell, Elwell, and "old man" Bowers and some other gentleman went out to that lane to settle the "dispute on that road," and he understood that they did settle it. In the meantime the years have been going by, and four times the usual period to obtain a right by prescription passed before there was an attempted halt. It is presumed, under the authorities above cited, that the right of plaintiff to use the road owes its origin to a grant from the defendant or his grantors to the plaintiff or his grantors, and the defendant is required to overcome this presumption by a preponderance of the evidence. In addition, it may be said that the district judge was close to the witnesses and to all the circumstances of the case, and that he had perhaps a better opportunity to determine the facts than we have. We see no reason to reverse his judgment.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurs only in the result.

HENRY WEHNES, APPELLEE, v. WILLIAM ROBERTS, APPELLANT.

FILED DECEMBER 18, 1912. No. 16,834.

1. **Parol Evidence: ADMISSIBILITY.** "Evidence tending to establish a separate oral agreement between the parties to a written contract, as to matters upon which such contract is silent, if it does not tend to vary or contradict the terms of the written document, is admissible." *Huffman v. Ellis*, 64 Neb. 623.
2. **Trial: INSTRUCTIONS.** The instructions examined, and held not to be prejudicial to the defendant.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

J. W. James, for appellant.

J. E. Willits, *contra*.

HAMER, J.

This is an appeal from the judgment of the district court for Adams county in favor of the plaintiff, Henry Wehnes. In the summer of 1908 the defendant, William Roberts, appellant in this court, sold the plaintiff a threshing outfit consisting of a steam engine and a grain separator, with blower and feeder and water tank with trucks, for the purchase price of which the plaintiff gave his promissory notes to the defendant, one for \$600, payable November 1, 1908, and one for \$700, payable November 1, 1909. The notes in question seem to have become the property of the Roseland State Bank in the due course of business. The plaintiff sued the defendant, alleging a contract whereby defendant was to furnish all the repairs needed by the threshing outfit for the year 1908, and that defendant was to place them upon said engine and separator when given notice to do so by the plaintiff. This part of the agreement was not evidenced by writing, but rested wholly in parol. The plaintiff gave notice of needed repairs, which the defendant refused to furnish, where-

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upon they were purchased by the plaintiff. The plaintiff also alleged a warranty by the defendant that the machine would work, and that the defendant would make it work, and a breach of the warranty. The plaintiff prayed judgment for the value of the repairs and cost of putting them on, and for damage because of the breach of the warranty. The answer admits the sale of the machine, and denies the other allegations. The plaintiff had a verdict and judgment.

It appears from the evidence that the agreement for the sale of the machinery was made in April. This is the contract sued on. Contemporaneous with the making of this agreement, the parties executed a written instrument embodying at least some of the terms of the sale. The written instrument does not appear to have been introduced in evidence, but the testimony of both parties agrees as to what the instrument contains. Upon the trial the plaintiff was permitted to prove, over the defendant's objection, the parol contract sued on. The defendant's objection was that the testimony of the plaintiff himself showed the contract to have been reduced to writing, and that evidence of any agreement not shown by the writing itself was incompetent. While it is not permitted to vary or contradict the terms of a written instrument showing the terms of an agreement, that rule is not violated by evidence of a parol agreement either prior to or contemporaneous with the execution of a written instrument, if the parol agreement is as to some matter collateral to the agreement contained in the written instrument, or if the parol agreement constitutes the inducement for the execution of the written instrument.

In *Norman v. Waite*, 30 Neb. 302, this court held, as stated in the syllabus: "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct

oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend." In the body of the opinion Judge COBB, who delivered the opinion of the court, referred to the case of *Michels v. Olmstead*, 14 Fed. 219, and said that he did not remember to have seen the law on this subject so clearly stated elsewhere as by Judge Krekel in the case cited. He then gives Judge Krekel's charge to the jury: "When parties, without any *fraud* or *mistake*, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the *only evidence* of the agreement; but this does not prevent parties to a written agreement from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend."

In *Huffman v. Ellis*, 64 Neb. 623, this court held, as expressed in the syllabus: "Evidence tending to establish a separate oral agreement between the parties to a written contract, as to matters upon which such contract is silent, if it does not tend to vary or contradict the terms of the written document, is admissible."

In *Barnett v. Pratt*, 37 Neb. 349, this court held, as expressed in the syllabus: "A brought suit against B alleging, that C was indebted to A for wages; that B purchased C's business, out of which the debt arose, and in part consideration agreed to pay C's debt to A; that this agreement was omitted from an instrument in the form of a receipt set out in the petition, and containing other terms of the transfer, and that the omission was to prevent a third person from learning of the promise. *Held*. That the petition stated a cause of action." Also held that "such a promise, omitted from a written agreement, may be proved by parol where the promisee was induced to execute the writing on the faith of the oral promise." Also that "such a promise is not within the statute of frauds." In the body of the opinion Commissioner

IRVINE said: "We cannot regard the instrument referred to in the petition as a contract complete in itself. It purports only to be a receipt. It is signed only by W. J. Pratt, and not by the party assuming these obligations, and its whole effect is that of an informal memorandum, and not the expression of a complete contract. Further, it is settled by a considerable line of authority that where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument."

In *Chapin v. Dobson*, 78 N. Y. 74, the New York court of appeals held, as stated in the syllabus: "The rule prohibiting the reception of parol evidence, varying or modifying a written agreement, does not apply where the original contract was verbal and entire, and a part only was reduced to writing; nor does it apply to a collateral undertaking; these facts are always open to inquiry and may be proved by parol."

In *Ferguson v. Rafferty*, 128 Pa. St. 337, the supreme court of Pennsylvania held, as stated in the syllabus: "Where the execution of a written agreement has been induced upon the faith of an oral stipulation, made at the time but omitted from the written agreement, though not by fraud, accident or mistake, parol evidence of the oral stipulation is admissible to add to or change the terms of the written instrument."

In a comparatively recent case this court held in *De Laval Separator Co. v. Jelinek*, 77 Neb. 192, as stated in the syllabus: "If a written memorandum confirmatory of a previous oral agreement does not purport to recite the whole of the latter, oral testimony is admissible to supply omitted covenants not inconsistent with the writing." In the body of the opinion this court, through Commissioner AMES, said: "The sole ground, as it appears, upon which the objection was sustained and the instruc-

tion given is that the answer is an attempt to contradict or vary the terms of a written contract by oral testimony. Manifestly it attempts to do no such thing, but does attempt to show that the writing does not express the entire agreement of the parties, nor purport so to do. If it does so purport, it is doubtless as conclusive in that respect as it is with regard to any other matter concerning which it speaks; but, if it does not so purport, then the question whether it does contain the entire agreement, and, if not, what are the omitted terms of the contract, are questions of fact to be determined in like manner as any other fact that is or might be put in issue by the pleadings."

Both parties to the written instrument agree that it provided only for the time of delivery, and the time and manner of payment for the machine. It follows therefore that the contract sued on was collateral to the agreement contained in the written instrument, and in no way tended to contradict or vary its terms.

Complaint was next made by appellant of the giving of certain instructions; they being instructions No. 2 and No. 5. By instruction No. 5 the jury were told that, if they found for the plaintiff, then they were to "find such sum as you believe from the evidence will compensate him for the injury and damage he has suffered, not exceeding the sum of \$415.50, and interest thereon from September 15, 1909; and, in determining the amount of such damage, you should take into account the cost of the repairs purchased by the plaintiff, and the value of the labor and time to place said repairs on said threshing outfit." It is contended by the appellant that this instruction had a tendency to mislead the jury, for that it would seem to authorize a verdict of \$415.50, when, under the evidence and other instructions of the court, no recovery could be had for the breach of warranty, and, as \$200 of the amount claimed was claimed for damages on this account, in no event could plaintiff have recovered more than \$215.50. It is hard to see how this instruction could have misled the jury as the amount claimed by the

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plaintiff for furnishing repairs and for the breach of warranty is set out by the court. The jury are further told that there is no evidence of damages for the failure of the warranty, and they are further told that the only issue is as to a contract for furnishing the repairs, and the cost of the repairs purchased by the plaintiff, and the cost of putting them on. These instructions, when construed together, state the issue fairly. The verdict returned was for less than the amount claimed as the money expended for procuring the repairs, and the error, if it was an error, was without prejudice.

It is further urged that this instruction and instruction No. 2 lay down an incorrect measure of damages, in that they make the measure of damages the cost of repairs to the plaintiff, rather than their reasonable value. While it is perhaps true that the proper measure is reasonable value and not actual cost, no prejudice resulted to the defendant, because the only evidence of reasonable value shows the reasonable value to be identical with the cost. It follows that this error, if it be an error, is likewise without prejudice. We are unable to discover any error in the proceedings.

The judgment of the district court is

AFFIRMED.

ROBERT J. GADDIS, APPELLEE, V. SCHOOL DISTRICT OF THE CITY OF LINCOLN ET AL., APPELLANTS.

FILED DECEMBER 24, 1912. No. 17,828.

1. **School Districts: GOVERNMENT.** By the school laws of Nebraska (Comp. St. 1911, ch. 79), two distinct forms of school-district government are provided for; that of school districts in incorporated cities having more than 1,500 inhabitants being by boards of education and representative in form, while that of the ordinary district in the country and in smaller cities and villages is democratic in form.
2. ———: ———: **RURAL DISTRICTS.** The ultimate control of the rural

school district resides in the electors, and is exercised at annual or special school meetings; and the directions of the voters as to school buildings and sites must be carried out by the directors strictly within the limits of the powers conferred upon them at the school meeting.

3. ———: ———: CITY DISTRICTS. In city districts which are governed by boards of education, the powers of the district reside in the board of education, and there are no more limitations upon the authority of the board to select school sites and erect school buildings than are placed, in a rural district, upon the electors present at the school meeting.
4. ———: SELECTION OF SCHOOL SITES. Since the repeal of the proviso to section 23, subd. XIV, ch. 79, Comp. St. 1891, there is no requirement that the question of the selection of school sites or the erection of school buildings be submitted to the electors of a city district in order to authorize the board of education to purchase sites and erect buildings.
5. ———: POWERS OF BOARD OF EDUCATION: SCHOOL SITES AND BUILDINGS. Except as limited by the statutes restricting the amount of taxes that may be levied, and the provisions regulating the borrowing of money by the issuance of bonds, the board of education has full power to administer the affairs of the school district as to school sites and buildings.
6. ———: ———: ERECTION OF BUILDINGS: FUNDS. There is no prohibition in the statute against a board of education of a city district, such as the city of Lincoln, from adding money derived from taxation to money obtained from issuing bonds voted for building purposes in order to pay for the erection of school buildings, if in the discretion of the board it deems it for the best interest of the district so to do.
7. ———: ———: FUNDS: LEVY. The direction in section 23, subd. XIV, ch. 79, Comp. St. 1911, is that the board of education shall estimate the amount of money necessary for the support of schools, the purchase of school sites, the erection of school buildings, the payment of interest, and the creation of a sinking fund, and report the same to the county commissioners for levy. There is no distinction made between the collection of money for the support of schools and money for sites or buildings derived from the estimate and levy. The tax is levied in gross for the whole amount of money required as shown by the estimate. The amount levied is equally subject to anticipatory use for all purposes named in the estimate. *School District v. Stough*, 4 Neb. 357; *State v. Sabin*, 39 Neb. 570; *Andrews v. School District*, 49 Neb. 420; *Pomerene v. School District*, 56 Neb. 126, distinguished.

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8. ———: ———: **CONTRACTS FOR BUILDINGS: INJUNCTION.** Where the amount of money required in a contract made by the school district of the city of Lincoln for the erection of certain school buildings does not exceed the amount of money on hand derived from the sale of bonds issued for building purposes, together with the amount of an estimate for building purposes made by the board of education, and a levy of taxes for that purpose made by the county commissioners for the current fiscal year, the contract will not be enjoined at the suit of a taxpayer as being *ultra vires* and void, because all the money is not in the treasury when the contract was made.
9. **Injunction: Costs.** Where, at the time a contract for the erection of school buildings was entered into, it was in excess of the powers of the board of education to make, and where by mutual agreement the contract was subsequently modified so as to bring it within the authority of the board of education, the modified contract will not be enjoined upon the ground that it is *ultra vires*. But, since the modification was made after the action was begun, the costs in the district court are taxable to the defendant.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Reversed.*

Mahoney & Kennedy, C. S. Allen and Tibbets & Anderson, for appellants.

Burr, Greene & Greene, contra.

LETTON, J.

This is an action by a taxpayer to enjoin the board of education of the city of Lincoln from carrying out a contract with the defendant F. P. Gould & Son for the erection of certain schoolhouses, and from paying the contractor any sum upon the contract, for the reason that the contract price exceeds the amount authorized for building purposes, and is in excess of the money and funds on hand at the time of the execution of the contract, that the construction of the Vine street school building contracted for was not authorized by a vote of the electors, and that the contract does not provide for the completion and furnishing of the buildings as voted by the electors, and,

therefore, is unauthorized, *ultra vires*, and void. The contract as originally made provided for the erection of a high school building and two grade school buildings. The price for each was separately fixed. The total amount payable in any event was \$546,973, and provision was made so that the absolute liability, if certain options as to material were exercised by the board of education, would not exceed the sum of \$493,683. By mutual consent the contract was afterwards modified by eliminating the provisions concerning one of the grade school buildings, so that at the time of the hearing the utmost liability of the district thereunder was \$451,837, with optional reductions as stated. The district court found that the contract was void, and granted an injunction as prayed in the petition. Defendants have appealed.

The stipulation of facts agreed upon shows that, at the election which was held to authorize the issuance of bonds, a choice of locations as to the site of the high school building was submitted to the voters, and that as to the bonds the ballot permitted the voters to express themselves for or against "the \$350,000 bonds and taxes (1) for erecting, constructing, finishing, furnishing and completing a high school building or buildings to be located on the place and upon the site to be selected by the electors at said election; (2) for erecting, constructing, finishing, furnishing and completing one grade school building (omitting description of location); (3) for erecting, constructing, finishing, furnishing and completing an annex to the Saratoga school, located on block 2, Cottage Grove addition to the city of Lincoln." Before the contract was let the bonds had been sold, and \$362,860.61 had been paid into the treasury from the proceeds thereof, out of which sum \$3,000 had been paid before letting of the contract. In June, 1912, the board of education submitted to the county commissioners its annual estimate, and included therein the sum of \$100,000 for the purchase of real estate and new buildings. The county commissioners levied a tax of 32 mills for maintenance of schools, purchase of

sites, and construction of buildings, which according to the valuation of property in the district, would produce the sum of \$13,306 in excess of the amount estimated. There was \$41,045 on hand from the gross revenues of the preceding year. No contract for heating, plumbing, and furnishing has been let, nor will such contracts be entered into until the present contract is completed. The estimated cost of plumbing, heating and furnishing for the three buildings is \$195,000. The annex to the Saratoga school has been constructed and paid for out of funds derived from 1911 taxes. The contract provides that the time limit for the completion of the Bancroft school shall be the 10th of August, 1913, and for the high school building, February 10, 1914. The architect testifies that if the work on the high school building is prosecuted with such diligence as would complete it on the date fixed in the contract, taking into account the reserved estimates, only about \$200,000 would become payable on the contract on or before July 1, 1913, and if the Bancroft building is completed by the date fixed, August 10, 1913, the amount that would be due and payable would be \$75,000. These seem to be the essential and determining facts in the case.

It is the contention of plaintiff that no authority is conferred upon the board of education to purchase school sites and erect buildings, unless authorized to do so by a vote of the electors of the district; that if by such vote the board has been authorized to issue bonds for the purpose of erecting, finishing and furnishing certain school buildings, it is beyond its power to enter into a contract to pay for the same more than the amount of money realized from the sale of the bonds on hand at the time the contract is entered into. In support of this contention he cites the case of *School District v. Stough*, 4 Neb. 357, which was an action by the assignee of certain school orders. The facts in this case were that the district was an ordinary country district, and that no authority or direction was given to the school board by the electors of

the district to build a schoolhouse or to let a contract therefor. At the previous school meeting a tax of 5 mills on the dollar had been levied for the purpose of building a schoolhouse. The board assumed that this gave it authority to act. It made a contract for the erection of a school building, issued orders upon the treasurer for the whole amount of the contract price, and delivered the same to the contractors in advance of any work, taking back a bond to secure the faithful performance of the contract. The contractors negotiated the orders the day after they were presented to and accepted by the district treasurer, and never built the schoolhouse. The court held that the orders were not negotiable and did not estop the school district as against a *bona fide* holder for value from availing itself of any defenses in the action which it would have had in an action brought by the original payee. After stating the facts, it said: "On these facts we are well satisfied that the school district is not liable on these orders." This disposed of the case, was all that was necessary to say, and all that was essential to the decision. But, Judge LAKE, writing the opinion, proceeds to say that the district board may not issue orders upon funds not collected, in order to evade the statutory provision that the "school district shall have power and authority to borrow money to pay for the sites for schoolhouses and to erect buildings thereon, and to furnish the same by a vote of a majority of the qualified voters of said district present at any annual or special meeting." But, in whichever way the building fund is raised, it is entirely beyond the control of the district board, except for safe-keeping, until the electors of the district, legally assembled, shall give directions as to how it shall be expended," and, hence, that the action of the board was without authority. While not essential to the decision, the rule thus announced was a wise and salutary one, especially at such an early period in the history of the state, when thousands of schoolhouses were yet to be built. Paragraph 3 of the syllabus is as follows: "Contracts for

the erection of a schoolhouse should be made with reference to the funds in the treasury for that purpose. The district board have no authority to draw orders in payment thereof, on a fund which has been proposed, but not raised by taxation." And it is on this proposition that plaintiff makes his main contention. Other cases cited by plaintiff as following the *Stough* case will now be examined.

In *Gehling v. School District*, 10 Neb. 239, the court merely holds that, where the electors at the school meeting authorized the board to expend \$20,000 in the building of a schoolhouse, the board had no authority to contract in excess of this amount, saying: "Not only is the authority to direct and control such expenditures withheld from the school board, but as we see is expressly entrusted to the whole body of the electors, by whom alone it can be exercised."

State v. Sabin, 39 Neb. 570, was a mandamus suit to compel the school district treasurer to pay an order, dated in 1889, and payable in March, 1891. The contract was made in July, 1889, and provided that payment should be made by orders drawing interest and payable a long time in the future. The court say: "This was directly issuing evidence of indebtedness against the school district due respectively in six, twelve, and eighteen months from date. * * * If evidences of indebtedness of the nature of that sought to be enforced in this action are to be held valid and binding, it will render wholly inoperative and useless the provisions of the statute regulating and restricting the issuance of bonds by school districts."

Pomerene v. School District, 56 Neb. 126, was brought to recover on the same contract as was involved in the *Sabin* case. The court held that both the time warrants and the contract were void; the warrants on the grounds stated in the *Sabin* case, and the contract because it provided for payment in illegal warrants.

Andrews v. School District, 49 Neb. 420, was an action brought to recover upon certain orders issued under a

contract made in 1888. The orders were payable in 1891. The court followed the *Sabin* case, and held that the school orders were void, but held that under the facts alleged in the petition recovery might be had upon the contract.

Markey v. School District, 58 Neb. 479, was also an action upon school orders payable at a future date; the contract being made in 1886 and the orders payable in 1890. In the opinion it is said: "School district officers can contract for the furnishing of schoolhouses only with reference to money on hand and at the time available for that purpose. The officers of the school district possessed no authority to make a contract or give a district order payable at a future time." This was a rural district.

Zimmerman v. State, 60 Neb. 633, merely holds that a school board, which at the time it was ordered to remove the schoolhouse had enough money on hand to pay the expense of removal, could not, a year later, justify itself by showing that it had not sufficient money on hand to move the schoolhouse and pay current expenses. It was held that, when a levy for these had been made, the fund might be drawn upon, even though not collected. It is said that the *Stough* case was correctly decided, but did not furnish a precedent in this case.

School District v. Randolph, 57 Neb. 546, follows the *Gehling* case in holding that in rural school districts the qualified electors at school meetings have the sole power to determine as to the erection of a schoolhouse and the extent of the expenditure to be made therefor.

Ladd v. School District, 70 Neb. 438, holds that a school board may not purchase a school site, unless authorized by the electors at a school meeting.

From this examination it appears that, in the only cases (*Andrews v. School District*, *State v. Sabin*, and *Pomerene v. School District*, *supra*) which involve school districts in cities in which boards of education are the governing body and in which no school meetings are provided for, the only matter in issue was with respect to the

validity of school orders made payable at a period long in the future, and issued when no levy had been made in order to provide a fund wherewith to pay the same. The question raised in this case as to whether boards of education in the school districts provided for by subdivision XIV, ch. 79, Comp. St. 1911, may lawfully make such a contract as this is still open. It is true some unguarded expressions have been used, particularly in the *Andrews* case, where the matter was not at issue and where the provisions of the particular statute involved here were not considered, but the questions here are new and must be determined from a consideration of the statutes bearing upon the subject.

A chronological examination of the statutes in this respect affords light upon the problem. The first act relating to common schools in the territory of Nebraska was passed in 1855. 1 Complete Session Laws, p. 89. Under the plan of organization provided thereby, the corporate power of the district resided in the electors assembled in school meeting, a board of three directors being elected at that time to carry out, as agents of the district, the powers conferred upon them at the meeting. The organization of the corporation was substantially the same as that provided for schools in rural districts at the present time. A new statute, differing mainly in matter of detail, was passed in 1856. 1 Complete Session Laws, p. 231. In 1858 (1 Complete Session Laws, p. 559) the latter act was repealed, and a new act was passed which created township districts, and placed the management and control of the same in the hands of a board of education. This is the first instance in the legislative history of the territory of the creation of a board of education as distinct from a board of directors. This act provided for the creation of subdistricts, and the election of a board of three directors in each subdistrict. These local directors were vested with similar powers with relation to schoolhouse sites and buildings as held by directors under the former acts, but their powers and authority in respect to such

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matters were derived from the township board of education, and not from the electors at a local school meeting. The act provided, in section 12, that the board of education had full power "to build, repair, and furnish the necessary schoolhouses, purchase or lease sites therefor, or rent suitable schoolrooms, and make all other necessary provisions relative to such schools as they may deem proper." By section 21 it was the duty of the township board of education to make annually estimates of the amount of money necessary for the support of the schools, and certify the same to the county clerk, who should assess the same upon the taxable property of the township. By section 22 the board had power "to estimate separately the cost of purchasing a schoolhouse site and erecting or repairing a schoolhouse thereon, in any particular sub-district of the township, * * * which amount so certified shall be assessed by the county clerk on the property therein subject to taxation and placed on the county duplicate, specially to be collected and paid over in the same manner as other school taxes, and be applied for the specific purpose of providing a schoolhouse in the sub-district." By section 30 of the same act each city or incorporated village which, with the territory annexed, contains not less than 300 inhabitants was created a separate school district. And it was provided that three persons should be elected in such city district who should constitute the members of the board of education of such district, and who should have the same powers and perform the same duties as a township board of education. This act seems to change the plan of government, and to take away all power from the school meeting, except to elect directors.

The next act of any importance seems to have been passed in 1866. 2 Complete Session Laws, p. 118. It changed the title of the "township board of education" to that of "precinct board of education." It retained in the board of education the powers which they possessed under the former act, conferred certain limited powers

as to central or high school districts in the precinct, but made no change as to the powers of the board of education in city or village districts.

In 1867 by "An act for the revision of the school law" (2 Complete Session Laws, p. 380), a return was made to the system of school districts governed by school meetings, and all powers respecting school sites and buildings were conferred upon the qualified voters in meeting assembled.

In 1869 a new act was passed, entitled "An act to establish a system of public instruction for the state of Nebraska." 2 Complete Session Laws, p. 448. This act, with but a few changes, has been carried forward into our present statutes with respect to the organization and government of rural school districts. It may be said that few of the former acts contain any repealing clause, but this repealed the act of 1867, and all other acts and parts of acts inconsistent with this act.

In 1871 a special act relative to schools in the city of Omaha was passed. 2 Complete Session Laws, p. 608. This act created a board of education with like powers to those possessed by the boards of education in city and village districts under the former acts. It contained, for the first time, provisions authorizing the board of education to issue bonds if necessary for school sites or buildings, with the proviso that no bonds should be issued without the consent of two-thirds of the board of education, and that if the bonds desired should exceed in amount the sum of \$15,000 the question of their issuance should be submitted to the electors at a special election.

In 1872 a special act for the government of the schools of Nebraska City was passed (2 Complete Session Laws, p. 640) which constituted the mayor and common council commissioners of the schoolhouse fund, and conferred upon them "all the rights, powers, and authority necessary for the purpose of raising money for erecting, purchasing, or leasing schoolhouses, and procuring sites therefor, and fitting up and furnishing thereof." Sections

4 and 5 of this act are substantially the same with respect to the duties of the commissioners in purchasing sites and building schoolhouses as provided in the Omaha act.

In 1873 a general act was passed, entitled "An act relative to public schools in cities of the first class." 2 Complete Session Laws, p. 698. The same powers and duties with respect to schoolhouses and sites, and the same limitation with respect to the issuance of bonds, are contained therein as in the former acts relating to Nebraska City and Omaha, with the further provision that, if the purchase of sites and the erection of buildings require the expenditure of more than \$15,000 for any one calendar year, the question shall be submitted to a vote of the electors, and the board of education shall, previous to such election, designate in at least one daily paper published in the district the locality of the site or sites required and the cost of the building to be erected thereon.

In 1875 (2 Complete Session Laws, p. 885) a similar act was passed relative to cities of the second class, but omitting the provision that the question of expending more than \$15,000 for schoolhouses or sites be submitted to the electors.

In 1881 an attempt was made to revise and codify the entire system of school laws into one comprehensive statute. An act was passed, entitled "An act to establish a system of public instruction for the state of Nebraska." Laws 1881, ch. 78. This act, as amended from time to time, is now in force. The first five subdivisions provide for the organization of school districts according to the town meeting plan, except in cities and villages with more than 2,000 inhabitants (now 1,500), and substantially as provided in the act of 1869. Other subdivisions provide for the organization of country high school districts; the qualifications of teachers for normal schools; for the distribution of state school funds, etc. The fourteenth subdivision, which is applicable to the school district of Lincoln, provides for the organization and administration of schools in all incorporated cities having

a population of more than 1,500, and leaves the powers and duties of the board of education practically as they were in the act of 1873. This act specifically repeals the acts of 1867, 1869, 1871, 1873, 1875, and all amendatory acts.

In 1893 the proviso that, in case the purchase of sites and erection of buildings for any one calendar year requires the expenditure of more than \$5,000, the question shall be submitted by a notice specifying the locality of the site required and the cost of the proposed building was stricken out by amendment. Laws 1893, ch. 31. This left the question as to the issuance of bonds the only matter as to which the board of education is bound to take a vote of the electors.

The provisions of section 4, relating to ballots for the purchase of sites and erection of buildings, clearly apply to the repealed proviso, and are like the splint bones in a horse's leg, or the hidden and rudimentary legs of some snakes, merely evidence of a discarded function. The argument based upon section 4, therefore, must fail.

From this survey of the course of legislation in the territory and state, it is apparent that two systems of school administration have existed side by side for more than half a century; one vesting the control of the corporation in the electors at the school meeting, and the other making the board of education the governing body. The act of 1873 (Gen. St. 1873, ch. 69), relative to schools in cities of the first class, provided in section 4: "That the affairs of the school district hereby created shall be conducted exclusively by boards of education, except as otherwise provided by this act." This thought is carried forward into section 1, subd. XIV, of the present act (Comp. St. 1911, ch. 79) in the following language: "The board of education, by this subdivision provided, shall have exclusive control of the same (all property of the district) for all purposes herein contemplated." Under the subdivisions relating to country districts, their government and control is almost a pure democracy, while

as to city districts the plan of government by boards of education is representative in form, limited only by the provision for a referendum to the electors on the question whether money shall be borrowed, by the issuance of bonds, for school sites and the erection of schoolhouses. The powers which under the one plan are conferred upon the electors, are by the other conferred upon the board of education. Since the proviso was repealed, there are no more limitations upon the powers of the board of education, to select school sites and erect school buildings, to be found in the statutes, than are placed, in a district organized under the other form, upon the electors present at the school meeting. The board, therefore, possesses all the powers of the electors themselves, except that, if money becomes necessary for the purchase of sites or the erection of buildings in excess of that which may be raised by direct taxation, the question of whether bonds may be issued must be submitted to the electors under section 24. If no bonds are necessary, a board of education with the powers of that of the city of Lincoln may select and purchase sites and erect school buildings thereupon by money derived from taxation. This seems to be the view taken in other states as to the powers of such boards under similar statutes. *Gunnison v. Board of Education*, 176 N. Y. 11, 17, 25; 35 Cyc. 832, note 80; 25 Am. & Eng. Ency. Law (2d ed.) p. 54.

This conclusion as to the power and authority of the board of education disposes of the contentions that the contract is void for the reasons that the contract price exceeds the amount authorized by the electors for building purposes; or because the construction of the Vine street building was not authorized by a vote of the electors; or for the reason that the contract is not in accordance with the authorization of the electors, in that it does not provide for the completion and furnishing of the buildings, and that a further large expenditure will be required for plumbing and heating.

The only question left for consideration is whether the

contract is void because the amount agreed to be paid exceeds the money and funds on hand at the time that the contract was made. As we have seen in our review of the cases, this exact question has never been decided so far as concerns a city district, though it has been assumed that the holding as to rural districts applied. The only provisions of the statute controlling the board of education as to this question are to be found in sections 23, 24, subd. XIV, ch. 79, Comp. St. 1911, and, so far as applicable, are as follows: Section 23. "That the board of education shall annually, during the month of June, report to the county commissioners an estimate of the amount of funds required for the support of the schools during the fiscal year, * * * the erection of school buildings, the payment of interest upon all bonds issued for school purposes, and the creation of a sinking fund for the payment of such indebtedness; and the county commissioners are hereby authorized and required to levy and collect the necessary amount the same as other taxes." Section 24. "That the aggregate school tax, exclusive of school bond taxes, shall in no one year exceed 35 mills."

The direction in section 23 is that the board shall estimate the amount of money necessary for the purchase of school sites, and the erection of school buildings, as well as the money needed for the support of schools, the payment of interest, etc. There is no distinction made between the collection and expenditure of money derived from the same levy for the support of schools, and money to be used for sites and buildings. When the amount required for all school purposes is certified to the county commissioners, they ascertain the percentage, and make the levy necessary to produce the money called for, in gross, and as a general fund. There is no provision in the statute for making distinct levies for each of the many purposes for which the estimate is made and the money required. The tax is levied for the whole estimate and the collector places it all in the same fund. It is presumed that the board will follow the estimate in expend-

ing the money, and perhaps it may be required to do so, but this we do not decide. Moreover, if any benefit from the levy is to be had during the fiscal year next ensuing, it must be subject to anticipatory use for all the purposes mentioned in the estimate. The exact question here is not whether the board may issue warrants upon the current levy, but it is whether the board may lawfully enter into a contract upon which it may become necessary at some time in the future to make payments, at a time when, although the levy has been made, the money has not all been actually collected. The fund being general, and there being no distinction in the law between money levied and collected for building and that for other purposes, we are convinced that the board has power to contract upon the basis of the levy, and before the taxes are collected. *School District v. Fiske*, 61 Neb. 3. The other opinions in *Fiske v. School District*, 58 Neb. 163, 59 Neb. 51, merely decide that the board of education of the city of Lincoln had power to contract for plans for a school building, even if the doctrine of the *Stough* case, *supra*, applied as to the erection of the building itself.

Coming now to the facts: When the contract was let, \$359,860 was in the treasury from the sale of bonds and \$41,045 from the gross revenue of the previous year, so that \$400,905 was actually in the treasury at that time. The contract provides for the payment of \$336,622 for the erection of the high school building and \$115,215 for the erection of the Bancroft building, so that the total amount required to make the payments under the contract is \$451,837, as against \$359,860 on hand from the proceeds of the sale of bonds and \$113,306 available from the proceeds of the levy outside of that required for other than building purposes. This exceeds the amount payable under the modified contract by several thousand dollars.

As to the contention based upon the fact that the proposal as to the issuance of bonds when presented to the voters contained specifications as to the manner in which the board purposed to expend the money: As we have

seen, no statute makes this a condition to the exercise by the board of its duties in providing school buildings. The result of the submission must be considered, therefore, obligatory as a limitation of the power to issue bonds, and advisory as to the manner of their expenditure. If in good faith the board is attempting to carry out the main purpose for which the bonds are voted, no one is entitled to interfere with its discretion as to details. The money raised by the bond issues may be used, as far as it goes, in carrying out the purpose of the board, but we know of no reason why it may not be added to by money derived from other sources if the necessities of the district require. *McCavick v. Independent School District*, 25 S. Dak. 449.

The stipulation recites: "That the three school buildings proposed to be constructed by said contract are needed for immediate use in said school district; that there are now 375 pupils more than can be accommodated in the present buildings of the defendant; that the school district is compelled to use and does use rooms in store buildings and basements for schoolrooms, and that half-day sessions are general in the lower grades; that at the beginning of the present year there was an increase in the enrollment of 335 pupils, in the grades alone, over the enrollment of the preceding year, which increase is of itself sufficient to fill a grade building of the size contemplated in said contract; that a large number of the present buildings are very old and unsanitary, poorly lighted, and with no system of ventilation; and, while the cost of the new buildings is a considerable sum, it is the lowest figure for which the actual necessities of the public schools of this district can be supplied."

The plaintiff is here seeking the extraordinary writ of injunction against the officers of the school district, to restrain what he asserts to be both a public and private wrong. The presumption is that the officers acted within their authority and did not transgress its scope, and the burden is on the plaintiff to disclose facts which will

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justify the court in the issuance of the writ. Nothing should be left for inference.

We are of the opinion that the contract, as modified, is within the power of the board of education to make, and the judgment of the district court is, therefore, reversed. Since, however, when the action was begun, the contract price for all three buildings exceeded the money on hand and available, the costs of the action in the district court were properly taxed to the defendants.

REVERSED.

HAMER, J., not sitting.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
JANUARY TERM, 1913.

WILLIAM D. TULLY, ADMINISTRATOR, APPELLEE, V. GRAND
ISLAND TELEPHONE COMPANY ET AL., APPELLEES;
FAIRMONT CREAMERY COMPANY, APPELLANT.

FILED JANUARY 16, 1913. No. 16,877.

1. **Master and Servant: ASSUMPTION OF RISK.** One who contracts to perform labor for another takes upon himself the assumption of such risks only as are necessarily and usually incident to the employment.
2. ———: ———: **DUTY OF MASTER.** If the employer has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the employee to be, he is bound to inform the employee of the fact, and, if he fails so to do, he is liable to the employee, or his representatives, for such damages as may result by reason of such cause.
3. **Pleading: SUFFICIENCY AFTER TRIAL.** It was alleged in the petition, in substance, that plaintiff's intestate, an employee of defendant, was killed by coming in contact with a broken guy wire, heavily charged with electricity, near defendant's place of business, and in the line or track which defendant's employees usually traveled in entering and leaving their place of employment; that defendant knew of the dangerous condition of the wire, but negligently failed to and omitted to remove the danger or warn the decedent of its existence, and the death resulted without negligence on the part of the decedent. *Held*, That when attacked for the first time after judgment, the petition would be liberally construed, and held to state a cause of action.

**APPEAL from the district court for Hall county: JAMES
R. HANNA, JUDGE. *Affirmed.***

R. R. Horth and Greene, Breckenridge, Gurley & Woodrough, for appellant.

O. A. Abbott, A. G. Abbott, W. H. Thompson, Charles G. Ryan, F. W. Ashton and B. H. Paine, contra.

REESE, C. J.

Plaintiff, as administrator of the estate of Stewart E. Tully, deceased, brought suit in the district court against the Grand Island Telephone Company, the Grand Island Electric Company, and the Fairmont Creamery Company, corporations, for damages resulting from the death of Stewart E. Tully; said death being caused by the alleged negligence of defendants. Issues were joined, a trial had, when the jury returned a verdict in favor of plaintiff and against all defendants for \$2,000. No motion for a new trial was filed by either the telephone or electric company. A motion was filed by the creamery company, but was stricken from the files because not filed within the time prescribed by law, when judgment was rendered against all defendants for the amount of the verdict. The creamery company appeals.

Among the errors assigned was that of the action of the district court in striking the motion for a new trial from the files. That ruling was reviewed by this court, and the decision is reported in 87 Neb. 822; the order of the district court being affirmed.

There remains but one question for decision, which is: Do the allegations contained in the petition state facts sufficient to constitute a cause of action against the appellant, the creamery company? The petition is of considerable length, and its substance only will be here stated. It is alleged that the electric company had its wires of very high voltage strung upon the poles in the streets of the city of Grand Island; that the telephone company also had its wires similarly placed in close and dangerous proximity to the wires of the electric company.

and that in so placing their wires both were negligent; that, at a place near the building occupied by the creamery company, there was a guy wire attached to the pole occupied by the two defendants; that the guy wire came in contact with the wires of said defendants, by which it became heavily charged, the lower end thereof becoming released, and the wire dropping upon the street; that early in the morning the decedent, being in the employ of the creamery company, while passing into the place of business of that company, came in contact with the suspended wire, received a shock therefrom, and was killed. That a cause of action was stated against the other two defendants is not questioned, and the averments need not be repeated here, except as may become necessary to an understanding of those which refer to appellant creamery company. There is some discussion of the evidence in the briefs; but, as we are precluded from consulting the bill of exceptions, the case must stand or fall upon the allegations of the petition alone. It is alleged that the decedent was in the employ of the creamery company; that the fallen wire was lying on the sidewalk and in the street near the building and place of business of that company; that said company employed a large number of employees, and operated its plant night and day; that the decedent was employed by it to work nights; that it was his duty to report in the morning when going off duty; that it was the duty of the company to provide a safe place in which its employees were to work, and provide safe exit from and entrance to its place of business; that, well knowing that its employees and others necessarily used the street and sidewalk, where the wire was suspended, in going to and from its place of business, it carelessly and negligently allowed the said heavily charged wire to hang near the corner of its building down onto its sidewalk and the street, and to lie coiled upon the sidewalk and on the street, directly in the path of persons and employees using the same, and well knowing that the wire carried the heavy current of electricity, dangerous to

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human life, and likely to endanger the life of any employee or workman who came in contact therewith, it carelessly and negligently failed and omitted to provide against said danger, either by removing the wire, or warning decedent of the presence of the same or of the danger therefrom; that the said Stewart E. Tully, while in the act of returning to said building to report "off duty," without fault or neglect on his part, came in contact with said wire and was killed, owing to the neglect of said creamery company and its codefendants.

It is provided in section 121 of the code that, "in the construction of any pleading, for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties." The rule of the statute is given its full effect where the contention is made for the first time after the judgment, or in the supreme court. *Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb. 198; *Chambers v. Barker*, 2 Neb. (Unof.) 523; *Sorensen v. Sorensen*, 68 Neb. 483; *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309; *Latenser v. Misner*, 56 Neb. 340; *First Nat. Bank v. Tompkins*, 3 Neb. (Unof.) 334. Applying this well-known rule to this case, it appears from the petition that the instrument of death was near to and practically adjoining defendant's place of business, and where it was known to defendant that its employees would have to pass and re-pass in going to and from the entrance to the building, and that defendant knew of the danger and the exposure of its employees to it, but negligently failed and omitted either to remove the wire or warn its employees of their danger, and, by reason of its failure so to remove the danger or warn decedent of its existence, the decedent was killed.

It is true, as a general proposition, that a defendant cannot usually be held liable for accidents caused by the acts or omissions of others over which he has no control, but a different rule must be applied where the instrument of danger is within such close proximity to his place of

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business as to be a menace to his employees, if he has knowledge of the danger and fails to seek its removal or warn his employees against it. In *Baxter v. Roberts*, 44 Cal. 187, 192, it is said: "That one contracting to perform labor or render service thereby takes upon himself such risks and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that, if the employer have knowledge or information showing that the particular employment is from extraneous causes known to him hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employee to be, he is bound to inform the latter of the fact or put him in possession of such information; these general principles of law are elementary and firmly established." Other cases might be cited to the same effect, but it is not deemed necessary.

Under the well-known rule for the construction of pleadings in such cases, it must be held that the averments of the petition are sufficient to constitute a cause of action.

The judgment of the district court is therefore

AFFIRMED.

JAMES M. WOODCOCK, APPELLEE, v. UNKNOWN HEIRS OF
MARY CROSBY ET AL., APPELLEES; E. H. HUBBARD ET
AL., APPELLANTS.

FILED JANUARY 16, 1913. No. 16,912.

1. **Adverse Possession.** "One who has been in the open, notorious, exclusive adverse possession of real property for ten years becomes vested with a valid title to the same." *City of Florence v. White*, 50 Neb. 516.
2. ———: **EVIDENCE** Evidence of the possession of real property "as owner" is not limited to the declarations or testimony of the claimant under the statute of limitations. The character or quality of the possession and use may be considered as the test.

3. **Appeal: HARMLESS ERROR.** The fact that the trial court erred in a part of its finding and decree, and the error is in favor of the otherwise losing party, and does not inhere in the general decree in favor of the successful party, and is without prejudice to the appellant, will not require a reversal of the decree.

APPEAL from the district court for Dakota county:
GUY T. GRAVES, JUDGE. *Affirmed.*

E. A. Burgess and R. E. Evans, for appellants.

Alfred Pizey and Paul Pizey, contra.

REESE, C. J.

This is an action to quiet the title to a number of lots in the village of South Sioux City, in Dakota county. A large number of persons were made defendants. The basis of plaintiff's claim, by which he alleges he became the owner of the property described in the petition, is that of adverse possession for more than ten years prior to the commencement of the suit. The possession is alleged to have been taken in the month of March, 1892, and continued up to the time of filing his petition in April, 1909. It appears that the defendants were improperly joined, as their record and paper titles are in many instances separate and several. However, answers and cross-petitions were filed, and, in so far as the answering defendants and cross-petitioners, appellants, were concerned, the causes were tried together, and are so presented to this court. The answers and cross-petitions are substantially alike, and consist of, first, general denials of the averments of the petition, with reference to the occupation and ownership of plaintiff; second, allegations of title in the answering defendants, and demand for an accounting of rents for the time it is alleged that plaintiff has wrongfully held possession, the same being declared to be for less than ten years, and that their titles be quieted. Cross-petitions were not filed by all defendants, the answer consisting

of denials. The cause was tried to the court, and a finding and decree were made and entered in favor of plaintiff and against the appealing defendants.

In the brief of defendants it is stated, no doubt correctly, that, as to the parties before this court, there was a waiver of separate trials, and the causes were tried together, upon the same evidence, although three separate and distinct appeals are involved in and presented by this record, to wit, E. H. Hubbard, as trustee for the Gateway Improvement Company, as to lots 2, 3, 4, 5, 7 and 8, in block 16, Railway addition, Second plat; Rose S. Taylor, as legatee and widow of Henry J. Taylor, deceased, and Edward B. Spaulding, who claim to own jointly lots 6 and 10, in block 16, Railway addition, Second plat; and the heirs of Mary Crosby, as to lot 6, in block 4, in Smiley & George's addition to South Sioux City. What disposition was made of the action, as to other lots and against other defendants, does not concern us in this investigation. The assignment of errors may be fairly said to be: That the findings of the court are not sustained by the evidence; that they are inconsistent; that they should have been in favor of defendants; and that the court erred in not dismissing the suit upon the close of plaintiff's evidence in chief, it being contended that the plaintiff had not shown himself entitled to any relief.

In so far as the plaintiff's possession is concerned, there is little, if any, conflict in the evidence. Stated in a general way, it is to the effect that in the year 1891 or 1892 a portion of the ground at least was grown up in brush, when plaintiff took possession, grubbed it, plowed and cultivated it, inclosing it, and has cultivated it ever since, no one questioning his right or possession. Each year that portion of the land has been cultivated by him or his tenants, principally by himself. Block 16 is situated in what is known as the "Y," which is between two railroad tracks, near their junction. The inclosure was made by the construction of a wire fence extending from and between the fences of the railroad along its right of way

upon either side. In late years that portion of the fence has not been kept up. All the other lots involved in this appeal were fenced and in part cultivated from the date and during the time above stated. The whole time of occupation extended over some 14 to 16 years continuously prior to the commencement of the suit. There seems to be no doubt but that the occupation and use of the property was open, exclusive, continuous, and never questioned. It is claimed by appellants that it was not adverse to the true owners, and that, for that reason, the statute of limitations has not run in plaintiff's favor.

The evidence as to the actual possession of the property in dispute by plaintiff was practically the same at the close of his case in chief as upon the close of the trial and final submission, and the contention that the court erred in overruling the motion to dismiss will be disposed of by the review of the whole case, and need not be further specifically noticed.

The further contention that there is an inconsistency in the decree is not without reason, but we are unable to see that the inconsistency referred to so inheres in the decree rendered as to require its reversal. The criticism is with reference to lot 5, in block 24, Railway addition, Second plat, which is claimed by the Crosby heirs. The evidence as to the possession of that lot is the same as that with reference to the other property. There was no difference in the claim of plaintiff between that lot and the others, and yet the court defeated plaintiff as to it, and the defendants as to all the other property. If plaintiff was entitled to recover at all he was entitled to a decree for the whole. He filed no cross-appeal, and therefore the decision as to the one lot is final. We are unable to find any ground for the distinction. It may have been based upon a letter written by plaintiff to T. F. Crosby on the 19th of February, 1909, in which plaintiff sought to purchase that particular lot, giving his reasons therefor, which need not be noticed here. If the plaintiff's title to any of the property was perfect by adverse possession, it

had been so for at least five years before that letter was written, and the offer to buy could not affect that title. If that was the reason for the decision as to that one lot, it was erroneous, but we are unable to see how it can inure to the benefit of defendants. The prejudice, if any exists, is against plaintiff, and he is not complaining. This leaves the case, as to the other property and appellants, to be disposed of upon the evidence and the law applicable thereto. As we are unable to detect any material or controlling difference between the contentions of appellants, if considered separately, we may not be expected to examine each individual appeal separate and apart from the others, as the same principles of law must be applied to each.

It must be conceded that plaintiff was in the open, continuous, uninterrupted and exclusive possession of the property from at least as early as the year 1894 to the time of the commencement of this suit in 1909, a period of at least 15 years. The evidence tends to prove that the possession began in 1892, which would make the duration of the possession 17 years. While this is not seriously disputed or questioned by defendants, it is urged with much earnestness and no little ability that the possession was not adverse nor under any claim of ownership; that the whole of the possession was a wanton trespass without any claim of right; that it was permissive and without any knowledge or suspicion on the part of appellants that any claim of ownership would be made by plaintiff if allowed to remain in the use of the property. There can be no doubt but that if appellants were at all familiar with the property they knew of plaintiff's possession; that he cleared block 16 of the woods thereon, had inclosed and cultivated it during all those years, and yet no objection was made and no permission given. They may have acquiesced, but there is no evidence of permission. They knew the law that the possession might ripen into a title, depending on the quality of that possession. If plaintiff was a wanton trespasser, they had the full ten

years in which to assert their right and oust him. A lease, or other recognition of their rights, would have prevented the running of the statute if his possession should be adverse, yet no steps were taken until long after the expiration of the statutory period. He undoubtedly was a trespasser at the commencement of his possession. He entered by no color of right, but that would not prevent the statute of limitations running in his favor if the possession continued and was adverse. So far as outward indications could go, he exercised all the rights of ownership by inclosing and cultivating the land, thus excluding all others from the possession. By his testimony and actions he occupied the property *as* owner, that is, as any owner would do. There is no direct evidence that at and during the time plaintiff entered upon and occupied the property he then claimed to be the owner of the same. He was asked the question when upon the stand in rebuttal, but, upon objection being made by defendants, he was not permitted to answer. It is well-settled law that, in order to have the protection of the statute of limitations, the possession of the disseizor must be "as owner," but the method of proving the claim of ownership is not limited to his testimony upon the witness stand, nor to his declarations of ownership during the period of occupation within the time provided by statute. The character or quality of the possession and use are proper to be considered as the test. The clearing and the grubbing of the brush and trees growing thereon, its inclosure so as to exclude all persons who might desire to enter, the annual cultivation of the soil, and the renting or leasing of it to tenants, are all acts indicia of ownership, and are sufficient notice to the rest of the world that the possession is adverse. *City of Florence v. White*, 50 Neb. 516; *Horbach v. Miller*, 4 Neb. 31; *Gatling v. Lane*, 17 Neb. 77, 80; *Lantry v. Parker*, 37 Neb. 353; *Lewon v. Heath*, 53 Neb. 707. In *Ryan v. City of Lincoln*, 85 Neb. 539, while the decision was against the claimant on account of his testimony being such as to negative any claim as owner,

Judge ROOT, in writing the opinion of the court, said: "The fact that the tract had been inclosed by a fence more than ten years preceding 1899, and that plaintiff and his grantors during that time had received all benefits that accrued from an exclusive occupation of the land, unexplained by other evidence, would unquestionably support a judgment in his favor. Those acts, in the words of Judge GANTT, 'are presumptive evidence and evincive of intention to assert ownership over and possession of the property.' *Horbach v. Miller*, 4 Neb. 31. If, however, that presumption is met by the sworn admission of the occupant that in exercising dominion over the land he did not claim to own it, the presumption will disappear."

We conclude therefore that the adverse character of plaintiff's possession is sufficiently proved to sustain the decree of the district court. The contention of defendants that, in order to set the statute of limitations in motion, the possession of the occupant must be as owner is fully recognized, but the claim of ownership may be proved by the circumstances attending the occupation. Certain facts are proved which might bear the construction of a disparagement of plaintiff's claim of ownership; but, as they all occurred subsequent to the complete running of the statute, they are not at all conclusive and need not be discussed.

The judgment of the district court is

AFFIRMED.

**SAMUEL PATTERSON, APPELLANT, V. STATE OF NEBRASKA,
APPELLEE.**

FILED JANUARY 16, 1913. No. 17,637.

1. **Officers: DE FACTO OFFICERS.** Where a person who has been appointed to an office qualifies for the position, assumes the duties of the office, is actually engaged in the discharge of its functions under color and claim of right to the office, acquiesced in by the

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public during all of the time of his occupancy, such officer will at least be deemed and held to be a *de facto* officer. *Dredia v. Baache*, 60 Neb. 655.

2. ———: CLAIMANTS: RIGHT TO COMPENSATION. Where a *de facto* officer has discharged all the duties of a state office, has been recognized by the state accounting officers as properly and legally holding the office, paid the salary for the full time out of an appropriation made for that purpose, thus exhausting the fund, a claimant of the office who discharged none of its duties cannot, after the expiration of the term, enforce the payment to himself of the salary from the state. The fact that the claimant was deprived of the right to the office by an injunction wrongfully issued out of the circuit court of the United States, and which was subsequently set aside by the supreme court of the United States on appeal, would not affect the rights of the state in an action by the claimant to recover the salary, the same having been paid to the person who performed all the duties of the office under a claim of right, and whose incumbency was acquiesced in by the state officers and the public.
3. ———: QUALIFICATION: SECRETARY STATE BANKING BOARD. The law requires the secretary of the state banking board to give an official bond for the faithful performance of the duties of the office. The giving and depositing of the bond in the office of the secretary of state is a prerequisite to the holding of the office and the discharge of its duties. Where an appointee to such office executes his bond, files it with the secretary of state, but later withdraws it, leaving no bond in its stead, and discharges none of the duties of the office, he is not entitled to the salary, another having discharged all the official duties under a claim of right and having been recognized by the state and the public as such officer, the salary having been paid to him by the accounting and disbursing officers of the state.
4. States: SALARIES OF OFFICERS: PAYMENT. The state pays a salary but once, if paid through the regular channels provided by law for the payment thereof, and by which the appropriation for that purpose is exhausted.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Matthew Gering, for appellant.

Grant G. Martin, Attorney General, *George W. Ayres*
and *Frank E. Edgerton*, contra.

REESE, C. J.

In the year 1909 the legislature of this state passed what is popularly known as the "Bank Guaranty Law." Laws 1909, ch. 10. Under the authority and provisions of that law, the governor appointed plaintiff to the office of secretary of the state banking board. The salary of that office was fixed by the act at \$3,000 a year. The appointment was made after the passage and approval of the act, but before it became effective; there being no emergency clause contained in the bill. Plaintiff accepted the appointment, took the required oath, and executed a personal official bond, which was delivered to the governor. Later he withdrew that bond, and caused a bond issued by an indemnity company to be filed in its stead. It being contended that the guaranty law was unconstitutional and void, a suit was instituted in the United States circuit court for the district of Nebraska by one of the banks in this state, the purpose of which was to enjoin the enforcement of the law. The governor, the state banking board and plaintiff were made parties defendant in that suit. Such proceedings were had as resulted in a final decree perpetually enjoining the defendants therein from enforcing or attempting to enforce the provisions of the law. From that decree the state took an appeal to the supreme court of the United States, where the case was heard, and on the 3d day of January, 1911, a decree was entered finding the act valid and reversing the decree of the circuit court. Prior to the institution of that suit, and under the provisions of the law then in force, Edward Royce was duly appointed the secretary of the state banking board, and entered upon the duties of the office and continued to act until after the decision of the supreme court of the United States was rendered, when he was appointed the secretary under the provisions of the new law, and which office he still holds. The session of the legislature which enacted the guaranty law appropriated the sum of \$3,000 a year for and during

the succeeding biennium, making a total of \$6,000, to pay the salary of the secretary of the state banking board. Royce continued to act during the whole time, and the accounting and auditing officers of the state allowed and the auditor issued the necessary warrants for the payment of the salary until at the end of the two years, when the appropriation was exhausted, the warrants having been paid as issued. Plaintiff withdrew his official bond, leaving nothing in its stead, and engaged in the banking business on his own account, and paid no further attention to the matter, and never at any time devoted any time or attention to the duties of the office. Under the provisions of the constitution, the bank guaranty law took effect and became of force on the 7th day of July, 1909. On the 30th day of March, 1911, Royce was again appointed secretary of the banking board, and which appointment we understand is conceded to be a legal and valid appointment. Counting from the time the law went into force until this appointment, there was one year 8 months and 23 days during which time plaintiff claims he was unjustly deprived of the office. He filed his claim with the auditor demanding the full two years' salary from July 7, 1909, to July 7, 1911, making a total of \$6,000. The claim filed with the auditor was an elaborate statement of the facts upon which it was based, and on the hearing a number of alleged proofs and documents were presented. The auditor disallowed the claim, when the case was taken to the district court for Lancaster county, where voluminous pleadings were filed, and upon a trial the claim was again disallowed. The cause is now in this court on appeal from that decision.

The case is presented upon unusually well and carefully prepared briefs. It is conceded that plaintiff rendered no service to the state. It is also conceded that, after filing his official bond, he thereafter withdrew it from its legal custodian and surrendered it to the indemnity company, causing it to be canceled, and left nothing in its stead, the withdrawal, surrender and can-

cancellation having occurred on or about December 7, 1909, and it is conceded that the bond cost plaintiff nothing.

The guaranty law, under which plaintiff's appointment was made, requires that the secretary give an official bond in the sum of \$25,000. Without such bond he was not entitled to and could not hold the office, nor legally discharge its functions. *Rounds v. City of Bangor*, 46 Me. 541; *Foster v. Justices of the Inferior Court*, 9 Ga. 185; 23 Am. & Eng. Ency. Law (2d ed.) 354; 29 Cyc. 1387; *State v. Paxton*, 65 Neb. 110; *State v. Lansing*, 46 Neb. 514, 35 L. R. A. 124; *Holt County v. Scott*, 53 Neb. 176. It is provided in section 6, ch. 8, Comp. St. 1911, that the secretary, etc., "shall each enter into a bond, to the state of Nebraska, before taking their respective offices, with surety or sureties to be approved by the governor" in the sum of \$25,000. Not only did he withdraw the bond, but he devoted himself to his own banking business, evidently giving the affairs of the office no thought or attention.

It is claimed by the defense that the cancellation and withdrawal of the bond was such an act as would effectually deprive plaintiff of the right to any claim for the salary, irrespective of all other grounds upon which he might have based his demand. It is argued, in substance, that, had every impediment to the discharge of the duties of the office been removed after the cancellation and withdrawal of his bond, plaintiff could not have entered into the office without a requalification, and, as that never occurred, he is in no condition to demand the payment of the salary, even had the office otherwise been vacant and no one discharging its duties. While this contention might be entitled to consideration, we are not inclined to dispose of the case upon that ground alone.

It is contended by plaintiff that, having qualified and fully prepared himself for taking charge of the office, he thereby became the secretary *de jure*; that the order of injunction issued by the circuit court could not change his *status*; and that he so continued until the final appointment of his successor, the injunction having been can

celed and nullified by the judgment of the supreme court of the United States. While this may or may not be true, it cannot be held that the official action of the incumbent was void, nor that of the state accounting officers in paying him for the service rendered. If his acts were valid, he certainly was, to say the least, a *de facto* officer. As to whether Royce was a *de jure* or a *de facto* officer is not to our minds an important question here, for the reason that he did hold the office, did discharge the duties thereof, held under a former appointment under the former law, it is true, but the same office was continued, was recognized by the state officers as the secretary, was paid by them, and the appropriation made for that purpose exhausted. Whether the new law was constitutional or not, the office of secretary of the state banking board was continued—all the time in existence—and the demand for some one to discharge its duties was imperative. The injunction prevented plaintiff from doing so. It also prevented the governor from appointing another. If the new law was void, Royce was the *de jure* secretary. If it was valid, the office of secretary was continued with him as the incumbent in fact, and, his acts being valid, he was the *de facto* officer. The state pays a salary but once. The money is appropriated by the legislature for that specific purpose and could be used for no other. "One who holds and performs the duties of an office and receives the fees and emoluments thereof by virtue of an election or appointment thereto or under color of right, is a *de facto* officer and not a mere intruder." *Holt County v. Scott*, 53 Neb. 176.

In *Dredla v. Baache*, 60 Neb. 655, the question was presented as to the legality of the orders and proceedings of an acting county judge; it being contended that his acts were wholly void from want of authority to exercise the functions of the office. In the opinion by HOLCOMB, J., at page 662, we said: "Whether Wurzburg was a *de jure* or a *de facto* officer, it is unnecessary here to determine. A discussion of the distinction between the two

would be wholly without profit. We may assume that the only question is whether his acts while occupying the position he did are wholly void and unauthorized, or are valid as a *de facto* officer. It is apparent that he was actually engaged in the discharge of the duties of the office during the period mentioned under color of authority by reason of his appointment by the county commissioners and qualification thereunder; that he exercised the functions of the office under color of right and claim thereto, and that such right and authority were acknowledged and acquiesced in by the public and all those dealing with the affairs of the office during the whole period of his incumbency. To constitute a *de facto* officer it is only necessary that he have some appearance of right to the office which would lead the public without inquiry to suppose him to be the officer he assumes to be. Where a person is in the actual possession of an office, in the discharge of the official duties thereof under such color or claim of right to the office, he will be deemed and held to be a *de facto* officer."

In *Haskell v. Dutton*, 65 Neb. 274, the officer was the deputy clerk of the district court, under verbal appointment, without having complied with any of the provisions of the law relative to official bonds and oaths, but had acted in the capacity for a year or more. On deciding the case as to the legality of his acts, we said, SULLIVAN, C. J., writing the opinion: The deputy, "according to the narrowest definition of the term, was a *de facto* officer, and his acts, so far as they affected the parties to the suit, were just as binding and efficacious as they would have been if all the conditions necessary to make him a *de jure* officer had been fulfilled"—citing cases, and quoting from *Norton v. Shelby County*, 118 U. S. 425, wherein it was said by Justice Field: "Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the in-

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signia of the office, and exercises its powers and functions."

Applying these rules to the incumbency of Royce, it is clear that, to say the very least, he was a *de facto* officer, and that the payment to him of the salary, which he had earned, out of the appropriation, thus exhausting it, was a legal payment, and that the state officers would not be justified in paying it again to plaintiff, who had discharged none of the duties of the office.

It follows that the judgment of the district court must be, and is,

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

ROSE, J., concurring in part.

Plaintiff withdrew his official bond early in the term for which he was appointed. Afterward, his status was the same as if his appointment had never been made, since he did not in fact occupy the office at any time or perform any of the duties thereof. The claim he presented to the auditor of public accounts was a single demand for a warrant for \$6,000—the entire statutory compensation appropriated by the legislature for the full term. The allowance of the claim in its entirety was the question presented. In disallowing it, the auditor and the trial court did not err. For these reasons alone, I concur in the affirmance, but express no opinion on other questions discussed by the chief justice.

STATE, EX REL. O. G. LEIDIGH, APPELLANT, V. CHARLES JOHNSON, COUNTY TREASURER, APPELLEE.

FILED JANUARY 16, 1913. No. 17,740.

1. **Counties: CLAIMS: DEDUCTION OF PERSONAL TAXES.** The provisions of section 4466, Ann. St. 1911, confers upon the county board the

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authority to deduct delinquent personal taxes from claims allowed against the county, and "issue a warrant for the balance remaining." The law requires the deduction to be made by the board, and it has no authority to delegate that duty to another.

2. ———: ———: ———. In the settlement and allowance of claims against a county, the board acts judicially, and this includes the matter of the deduction of delinquent personal taxes from the amount found due upon the claim and rendering judgment for the "balance remaining."

APPEAL from the district court for Otoe county:
HARVEY D. TRAVIS, JUDGE. *Reversed.*

W. B. Comstock, Paul S. Topping and O. G. Leidigh,
for appellant.

W. F. Moran, contra.

REESE, C. J.

This is an application for a writ of mandamus to the county treasurer of Otoe county to compel him to pay a warrant for the sum of \$6, issued in relator's favor upon the treasury of the county. The transcript does not show the allowance of an alternative writ, nor that one was served upon the defendant, nor is there a copy of any writ included in the transcript. There appears a memorandum by some one, whether by the clerk or judge does not appear. It is as follows: "Issuance of writ. February 5, 1912, alternative writ issued, directing respondent to comply with the writ, or show cause why he refuses by 2 o'clock P. M. on the 12th day of February, 1912." This may be a correct history of what was done, but it is certainly no proper part of the court record, nor of a transcript. There being nothing in the record to show that a writ was served upon respondent, we may assume that the service was waived.

On the 10th of February, 1912, the respondent filed a general demurrer "to the affidavit and petition," the grounds thereof being "that said petition and affidavit

does not state a cause of action of the relator and against the respondent." In the absence of a served alternative writ, the demurrer or answer to the petition is proper practice (*State v. Chicago, St. P., M. & O. R. Co.*, 19 Neb. 476), and the contention of respondent that the writ takes the place of and is substituted for the petition, and no writ being shown in the transcript must defeat the appeal, has no merit. He did not demur to the writ. The demurrer was to the petition.

It is alleged in the petition, among other things, that the respondent is the county treasurer of Otoe county, and his duties as to the payment of warrants are set out; that relator is the owner of a certain warrant issued by order of the county commissioners of said county for the sum of \$6, payable to his order out of the general fund; that he presented the order to respondent for payment and demanded payment, but that defendant stamped upon the margin or face thereof the words, "This warrant issued subject to payment of personal taxes," and refused to pay the same; that at said time there were ample unappropriated funds in the general fund to pay the warrant; that no order had been made by the board of county commissioners deducting any delinquent taxes due and owing from relator, and it was the duty of respondent to pay the warrant. A writ of mandamus compelling payment is prayed for. The affidavit accompanying the petition is substantially in the same form, and need not be noticed. As we have shown above, when dealing with another phase of this case, respondent demurred to the petition. The demurrer was sustained, and the proceeding dismissed. Relator appeals.

It is said in the argument and brief of respondent that the county commissioners had previously "made a blanket order directing that said words be incorporated in all warrants delivered to persons owing the county personal taxes, and that the county treasurer deduct from the amount of said warrant the personal taxes owed by the party to whom said warrant was issued." But there is

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nothing of the kind shown in the transcript, and that subject cannot be considered. This court cannot take judicial notice of any such fact, and, if it were thought of sufficient importance to merit consideration, it should have been presented in an answer. All averments of the petition well pleaded are admitted by the demurrer. Therefore it is admitted that no action was taken by the commissioners directing, nor ordering deducted, any personal tax, and that the words stamped on the warrant were placed there by respondent without orders or authority so to do. There is no averment that relator owed no personal taxes. If the law is that the action of the county treasurer was void, and that, in the absence of any action by the commissioners directing the deduction, it was the duty of the respondent to pay the warrant without reference to whether the payee owed personal taxes or not, the averment would not be necessary; otherwise it would be.

The statute upon this subject is found in Ann. St. 1911, sec. 4466 *et seq.* In that section it is provided: "The county board of any county, whenever the account or claim of any person against the county is presented to them for allowance, may, in their discretion, procure from the county treasurer a certificate of the amount of delinquent personal taxes assessed against the person in whose favor the account or claim is presented, and may deduct from any amount found due upon such account or claim the amount of such tax, and issue a warrant for the balance remaining." If this section is mandatory and provides the only procedure by which the delinquent personal taxes can be deducted from an allowed claim, it is pretty clear that the demurrer was not well taken, and should have been overruled. The statute was intended as an aid to the collection of delinquent personal taxes. The section under consideration presents an easy and convenient method of collection where the county is indebted to a delinquent. A strict construction should not be indulged in when the requirements of the law are sub-

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stantially followed, but some attention should be given to its provisions. The warrant does not appear to have been issued for "the balance remaining" after deducting taxes, but for the whole amount of the claim, which was in clear violation of the duty of the board, if it was the intention to deduct the taxes. While we are of opinion it is not necessary to call upon the county treasurer for the statement of delinquent personal taxes in each particular case, yet it is necessary that the evidence of such delinquency be furnished the board by him, and that they make the deduction. We find no provision imposing that duty upon the treasurer. In the allowance of the claim the board acts judicially. *State v. Buffalo County*, 6 Neb. 454. It follows that the judicial quality of the act extends to the deductions for taxes to be made by them. The deduction is to be made before the warrant is issued, and it shall be only for the balance due the claimant. Nothing of the kind was done, so far as is shown by the record. The matter of making the deduction is left to the discretion of the board. So far as appears, they declined to exercise the power given, allowed the claim, and issued the warrant for the whole amount thereof. If the county, or respondent, has any defense, it should be set up by way of answer.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

SEDGWICK, J., dissenting.

1. I do not agree that the law is correctly stated in the syllabus. The board acted in a *quasi-judicial* capacity in considering and determining the amount of the plaintiff's claim against the county. The plaintiff's personal taxes, if any, needed no judicial determination. The statute appears to contemplate that the taxes will be deducted by the board from the amount of the claim as adjudicated by them. But it seems to be unnecessarily

technical to hold that the act of subtracting the taxes, as shown by the records, from the claim as allowed must be performed by the board itself and cannot be performed by any other person. To deduct the taxes, as shown by the records, from the adjudicated claim of plaintiff is not necessarily a judicial act. This question is not presented by this demurrer, and both paragraphs of the syllabus announce the same dictum.

2. The case was decided upon a demurrer to the petition for the writ. The petition alleges that the "relator owns a certain warrant that was legally issued and drawn upon accounts presented to, audited, and allowed by the board of commissioners of said county;" that the warrant was presented to the respondent, county treasurer, and that the county treasurer placed thereon without authority of law the words, "This warrant issued subject to payment of personal taxes." The demurrer to this petition was sustained, and this presents the question to be determined. When a warrant is legally issued upon an allowance of a claim by the county board, and the holder of the warrant takes it to the treasurer for payment, can the treasurer, without any authority from the county board, stamp on the warrant the words quoted above, and then pay only a part of the warrant after deducting the personal taxes? The opinion says that no one but the county board can make this deduction. If that is so, that ends the case. The warrant should have been paid when presented to the treasurer and there is no occasion for sending the case back for another trial.

3. The brief of the appellee urges that this case ought to be affirmed for two reasons: First. The warrant on which the action is based is not signed by the clerk. It is signed by the chairman of the county board of county commissioners and by the deputy clerk. Nothing is said upon this point in the opinion. Second. The main point presented in the brief of the appellee is that the method presented by the statute which authorizes the county board to deduct the personal taxes and allow a warrant for the

balance is not exclusive. He says in the brief that the method "is not mandatory; it is only directory, and any other method that accomplishes the same end will satisfy the statute." This is the real controversy between the parties, but it is not presented by this record.

4. The questions whether the county board could make a blanket order as recited in the majority opinion, and whether any other method is provided for deducting taxes from claims allowed than the method stated in the statute directing county boards to do it—these questions are not presented in this record. There is nothing in the petition demurred to that indicates anything, except that the treasurer wilfully, "without authority of law," stamped on the warrant that it was subject to personal taxes. There is nothing in the record to show that there were any personal taxes due, and there is nothing in the record to show or indicate that the county board has taken any action whatever, or that there is or could be any defense.

5. The amount of this claim is \$6. They have had a trial in the district court and have appealed to this court. The parties are represented by strong lawyers. They have presented a technical case here and ask for a technical decision. To order another trial in an action like this, when both parties are so fiercely standing upon the record they have made, and so continue this \$6 lawsuit, is not treating the taxpayers fairly. The parties want the law declared upon the record they have made; they are entitled to so much even in a \$6 case, but that is all they are entitled to.

The judgment should be reversed and the trial court directed to allow the writ as prayed.

OLD LINE BANKERS LIFE INSURANCE COMPANY, APPELLANT, v. JOHN WITT ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 17,495.

1. **Depositions: SUBPOENA DUCES TECUM: OPPOSITE PARTY.** An officer authorized by law to take depositions may, at the request of a party to an action, proceed to take the deposition of the opposing party, and to that end may issue a *subpoena duces tecum*, and compel the attendance of such party or parties as witnesses.
2. ———: ———: **ATTORNEY FOR OPPOSITE PARTY.** An attorney having the custody of documents and papers belonging to one of the parties may be required to produce such documents and papers as the opposing party to the action may be required to furnish as evidence.
3. ———: **INJUNCTION.** In such a case a court of equity will not enjoin an officer or a party from taking such depositions, unless it clearly appears that the officer is acting without jurisdiction, or is exceeding his lawful authority.
4. **Injunction: PETITION: SUFFICIENCY.** In such a case a petition for an injunction which fails to state facts tending to show that the officer is exceeding his jurisdiction, and is requiring or is about to require the production of evidence which is clearly privileged, is demurrable.
5. **Pleading: AMENDMENT: WAIVER.** Where a demurrer to a petition is sustained, and the plaintiff makes no request to amend, nor tenders an amended petition, but takes time to prepare a bill of exceptions, and procures an order of the court for a supersedeas bond for the purpose of prosecuting an appeal, he will be held to have waived his right of amendment, and the trial court may properly dismiss his action.

APPEAL from the district court for Lancaster county:
P. JAMES CONGRAVE, JUDGE. *Affirmed.*

Edward F. Pettis, for appellant.

Courtright & Sidner, contra.

BARNES, J.

Appeal from a judgment of the district court for Lancaster county vacating a temporary restraining order and

dismissing plaintiff's petition for an injunction. This appeal was consolidated and has been submitted with *Witt v. Old Line Bankers Life Ins. Co.*, p. 763, *post*.

It appears that on January 12, 1912, the action last above mentioned was pending in the district court for Dodge county, wherein the plaintiff, Witt, sought to recover from the defendant, the Old Line Bankers Life Insurance Company, a certain advanced premium. It further appears that on January 15, 1912, one J. A. Brown, a notary public in and for Lancaster county, at the request of plaintiff in that action, issued a subpoena, the terms of which purported to command J. A. Harley, M. L. Blackburn, and E. F. Pettis, as witnesses in behalf of the plaintiff in the aforesaid action, to appear before him to testify, by deposition, as witnesses in the action pending in Dodge county, as aforesaid, and to bring with them certain documents and papers which the plaintiff sought to procure as evidence in that cause. It also appears that E. F. Pettis was the attorney of the Old Line Bankers Life Insurance Company, who was conducting its defense in the action above mentioned, and that the papers and documents described in the subpoena were in his possession as such attorney.

The plaintiff thereupon brought this action, setting forth in its petition the foregoing facts, together with a description of the papers and documents sought to be produced before the notary public, which are described as follows: "The application of the plaintiff above mentioned for a policy of insurance in the defendant; the medical examination made by O. C. Hopper, accompanying or relating to said application; all letters written by the plaintiff to the defendant or to any of its officers, agents, representatives or physicians from August, 1905, to July, 1906, inclusive; carbon or letter-press copies of all letters written by the defendant or any of its officers, agents, representatives or physicians to the plaintiff from August, 1905, to July, 1906, inclusive; carbon or letter-press copies of all letters written by the defendant to any

of its officers, agents, representatives or physicians to O. C. Hopper from August, 1905, to July, 1906, inclusive; and all letters written to defendant or any of its officers, agents, representatives or physicians by O. C. Hopper from August, 1905, to July, 1906, inclusive." Plaintiff prayed for an injunction restraining any of said witnesses, to wit, Harley, Blackburn, or Pettis, from producing any of the documents or papers mentioned in the subpoena, and that defendants be enjoined from asking the witness Pettis to answer as to any communication whatsoever between himself and his client, and for general equitable relief. Service was had upon the defendant Brown in Lancaster county, and a summons was sent to Dodge county and was there served on defendant Witt. The defendant Brown demurred to the plaintiff's petition, and the defendant Witt filed a special appearance objecting to the jurisdiction of the court over his person. Defendant Brown's demurrer to the petition was sustained, and it was held that the court had obtained no jurisdiction over defendant Witt. Thereupon the temporary restraining order was dissolved and the action was dismissed.

It is appellant's main contention that the district court erred in sustaining the demurrer to plaintiff's petition; and it is argued that a party to an action and a notary public may be enjoined from taking the deposition of an attorney or a party to an action where it is sought to require such attorney to give evidence and produce papers and documents which the opposing party deems necessary for the purpose of properly conducting his case, if it is alleged that the evidence and the production of the papers are privileged. We are of opinion that, where it clearly appears that the notary is proceeding illegally and in violation of his legal authority, such an injunction may be granted; but, as we view the plaintiff's petition in this case, it is entirely insufficient to warrant the relief prayed for.

It must be conceded that in this state the parties to a civil action are competent witnesses, and each may be

compelled to testify in favor of the adverse party the same as any witness; and it has been held that a notary public has power to commit a witness for contempt who refuses to give his deposition in a proper case. *Dogge v. State*, 21 Neb. 272. The rule is also well settled that an attorney may be required to produce papers which his client could be compelled to produce. *Harrisburg Car Mfg. Co. v. Sloan*, 120 Ind. 156; *Ex parte Maulsby*, 13 Md. 625; *Allen v. Hartford Life Ins. Co.*, 72 Conn. 693. In *Dogge v. State*, *supra*, it was said: "From an examination of the statute we are convinced that it was the intention of the legislature, in the enactment of the chapter on evidence, to remove every barrier to the discovery of truth, where the parties to the action have equal opportunity to testify. And, where necessary, either party may call the other to testify as to facts exclusively within his knowledge, provided the questions are not privileged."

In *In re Hammond*, 83 Neb. 636, it was held that a refusal to answer such improper questions as would constitute abuse of process is not a contempt, and may not be punished; and a witness is entitled to his privileges and his immunities, as well when a deposition is taken as when examined in open court. Therefore, if the evidence which was sought to be elicited from the defendant's attorney was in fact privileged, his rights could have been protected without the intervention of a court of equity. It is not seriously contended that an officer authorized to take depositions is not clothed with the power to require the production of papers and documents by a *subpoena duces tecum*; but such a proceeding is often unnecessary and may be improper in a case of this kind, for sections 393 to 395 of the code specifically provide for the production and inspection of papers and documents in the possession of an opposing party. Therefore, in view of the foregoing authorities, it may be stated that a court of equity will not restrain an officer from exercising his authority to take depositions, unless it is clearly shown that he is attempting to do so unlawfully.

We understand the contention to be that all documents and papers in the hands of an attorney belonging to his client are privileged, and therefore plaintiff was entitled to the writ of injunction restraining the defendant from requiring the production of the papers and documents described in the *subpoena duces tecum*. We are of opinion that this contention is too broadly stated, and cannot be sustained. It is true that by the plaintiff's petition it is alleged that the evidence of the witness Pettis was privileged, but this is merely a legal conclusion. It must be observed that the petition contains no direct allegation that the witness was or would be called upon or required to divulge any confidential matter which had been imparted to him as attorney for the defendant in the action in which the deposition was sought to be taken. It follows, therefore, that the plaintiff was not entitled to the extraordinary writ of injunction to prevent the taking of the testimony in question, and the demurrer to the plaintiff's petition was properly sustained.

It is further contended that, where a demurrer is sustained to a petition, the plaintiff has the right to file an amended pleading, and therefore the court erred in dismissing the action. It is a sufficient answer to this contention to say that the record fails to disclose any request by the plaintiff to amend his petition. Not only did counsel fail to make such a request, but, as a matter of fact, he stood upon his petition by excepting to the ruling, by obtaining time to settle his bill of exceptions, and by securing an order of the court fixing a supersedeas bond for the purpose of prosecuting his appeal. Therefore this contention is without merit.

Finally, it is argued that the district court erred in treating the special appearance of defendant Witt as a demurrer to the plaintiff's petition. If this was error, it was without prejudice to the plaintiff's rights. The demurrer of defendant Brown was properly sustained, and the action was rightly dismissed as to both of the defendants.

State v. Hevelone.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

FAWCETT, J.

I concur, but upon the ground that the application for relief should have been made in the court where the case in which the depositions were being taken was pending.

STATE, EX REL. FARMERS STATE BANK OF PICKRELL,
APPELLEE, V. ELMER L. HEVELONE, COUNTY TREAS-
URER, APPELLANT.

FILED JANUARY 16, 1913. No. 17,533.

1. **Statutes: AMENDMENT.** The legislature may amend a statute by appending a proviso to a section thereof, if the subject of the proviso is clearly within the title to the original act and is germane to its provisions.
2. ———: ———: **CONSTRUCTION.** The section of an act properly amended should be construed precisely as though it had been originally enacted in its amended form.
3. ———: **REPEAL BY IMPLICATION.** A legislative act complete in itself is not inimical to the provisions of section 11, art. III of the constitution; and where such an act is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute is repealed by implication.
4. **Banks and Banking: DEPOSITORY BANKS: BONDS.** So much of the depository law of 1891 as required depository banks to give bonds for the safe-keeping and return of public funds is repealed by section 46 of the banking act of 1909, as amended in 1911 (laws 1911, ch. 8); and a state bank which has complied with all the provisions of that act is entitled to its *pro rata* share of the deposit of public funds without giving a bond for the safe-keeping and return of such funds.

APPEAL from the district court for Gage county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

F. O. McGirr and M. W. Terry, for appellant.

Field, Ricketts & Ricketts and Hazlett & Jack, contra.

BARNES, J.

The relator is a state bank, organized and doing business under the provisions of the banking act of 1909, and the respondent is the county treasurer of Gage county, Nebraska. The relator brought this suit to compel the respondent, as county treasurer, to deposit with it its *pro rata* share of public funds made by him as such treasurer, without giving other security for the safe-keeping of such deposits than that provided for by the depositors' guaranty fund, as required by the guaranty bank act under which it was organized and is doing business. The respondent demurred to the petition. The demurrer was overruled, and he stood on his demurrer. Thereupon, it was ordered that the writ issue in accordance with the prayer of the relator's petition. The respondent has appealed, and the sole question for our determination is whether the relator is required to give security under what is known as the "depository law," in addition to the security provided by the banking act, and known as the "depositors' guaranty fund," to be entitled to participate in the deposit of public funds.

It must be conceded that if the relator was not required to give the depository bond provided for by section 20, art. III, ch. 18, Comp. St. 1891, which is a part of the depository law of 1891, in addition to its compliance with the provisions of the banking act of 1909, in order to entitle it to participate in the deposit of public funds, the judgment of the district court should be affirmed. The appellant contends, however, that so much of the depository law of 1891, known as section 20, art. III, ch. 18, Comp. St. 1891, is still in force; that the bond therein mentioned should have been given by the relator before it would be entitled to receive on deposit its proportionate share of

the public funds. On the other hand, the relator insists that the section above mentioned was repealed by the banking act of 1909, as amended in 1911. An examination of the legislation bearing upon this question may aid in its solution. The act authorizing the deposit of public funds was passed in 1891. Laws 1891, ch. 50. That act was amended in 1907, and comprises, as amended, sections 11364-11374, Ann. St. 1907, and will be hereafter referred to as the "depository act." The provisions of that act, so far as they have any bearing upon the questions under consideration, were that banks, in order to become depositories of public funds, are required to give approved security for the safe-keeping and return of such funds. In 1909 the legislature passed an act, entitled "An act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation." Laws 1909, ch. 10 (Ann. St. 1909, secs. 3700-3792). That act covers the entire subject of the organization, control and supervision of the business of banking in this state, and will be referred to hereafter as the "banking act." The distinctive features of that act, and the principal inducement to its passage, are the provisions made therein for a depositors' guaranty fund, which is created and administered under the provisions of the state banking board, to secure deposits made in such banks, whether of public or private funds. It necessarily follows, if state banks, in addition to maintaining a depositors' guaranty fund, must give approved security when the deposits are public funds, they are required to give double security for the deposits of such funds.

The banking act makes no express reference to the depository act; but it is provided by the banking act that the depositors' guaranty fund shall secure all deposits of public funds as well as private funds, and it may reasonably be presumed that the legislature did not intend the deposits of public funds should be doubly secured, first, by the depositors' guaranty fund, and, second, by approved security as provided by the depository act. It

appears, however, that, in order to avoid any misunderstanding upon that question, the legislature of 1911 amended the banking act of 1909, and among the sections thus amended was section 46. Section 46 as it stood before the amendment of 1911, was as follows: "As soon as said assessments are respectively levied, the banking corporation against which the same are levied shall be notified of the amount of such assessment levied against them, respectively, by the secretary of the state banking board, and said banking corporations shall thereupon set apart, keep and maintain in their said banks the amount thus levied against them, and the amounts thus levied, kept and maintained shall be and constitute what shall be designated as a depositors' guaranty fund, payable to the state banking board on demand for the uses and purposes hereinafter provided." By the amendment of 1911 two provisos were added to this section. The first has no bearing on the present controversy. The second is as follows: "Provided, further, that no bank which has complied in full with all of the provisions of this act shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depository funds shall be secured in the same manner that private funds are secured." By this amendment it is made clear that the legislature intended the provisions of the banking act requiring a depositors' guaranty fund should operate as a substitute for the approved security required by the depository act, where the deposit is public funds.

It is contended, however, that the amendment is inoperative and void; that the purpose of the legislature in passing it is defeated for the following reasons: First, a proviso is not an available method for making such an amendment; second, the amendment is not within the scope of the enacting clause of the banking act or the amendatory act, and is therefore void; third, the amendment is not germane to section 46, to which it is appended; fourth, the banking act, as amended, is obnoxious to sec-

tion 11, art. III of the constitution, because it amends or repeals the depository act by implication.

Considering the first of the foregoing contentions, it may be said that where a law is plain and unambiguous, whether expressed in general or limited terms, it will be presumed that the legislature intended to mean what they have plainly expressed, and that such intention should control the action of the judiciary; that where the intention is clearly ascertained, and no constitutional provisions are violated thereby, courts have no other duty to perform than to execute the legislative will, without regard to their own views as to the wisdom or justice of the particular enactment. *Hurford v. City of Omaha*, 4 Neb. 336. In *Shellenberger v. Ransom*, 41 Neb. 631, 643, it was said: "The rule is, as we shall constantly see, cardinal and universal that, if the statute is plain and unambiguous, there is no room for construction or interpretation. The legislature has spoken; their intention is free from doubt, and their will must be obeyed." In speaking of this subject the author in 2 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 352 (223) uses the following language: "The intention of the lawmaker, if plainly expressed, must have the force of law, though it may be in the form of a proviso. The intention expressed is paramount to form." *State v. Searle*, 86 Neb. 259; *Baggaley v. Pittsburg & Lake Superior Iron Co.*, 90 Fed. 636; *State v. City of St. Louis*, 174 Mo. 125, 145, 61 L. R. A. 593. In the case last cited it was held: "The proviso should be confined to what immediately precedes, unless a contrary intent clearly appears, and should be construed with the section with which it is connected. This rule is not, however, absolute, and, if the context requires, the proviso may be construed as a limitation extending over more than what immediately precedes, or may amount to an independent enactment."

In considering the question as to whether the proviso is germane to section 46 of the banking act, it should be observed that original section 46 of the banking act provides

that, as soon as assessments are levied by the banking board, the banks shall be notified of the amount of such levy, and are thereupon required to set apart, keep and maintain the amounts thus levied as a depositors' guaranty fund. This fund is payable to the banking board for the purpose of securing the deposit of both public and private funds. The amendment provides that no bank which has complied in full with all of the provisions of the banking act shall be required to give any further security to become a depository of public funds. Nothing could be more relevant to the provisions of that section. Again, the title of the original banking act is broad enough to cover the amendment to section 46. Omitting the repealing clause, the title to that act reads as follows: "An act for the regulation, supervision and control of the business of banking, and to provide penalties for its violation." This is a comprehensive title, and is broad enough to cover any provisions relating to the business of banking. To provide a scheme for the security of deposits was one of the chief inducements to the passage of the act, and the provisions made for a depositors' guaranty fund was the result. The validity of this feature has been tested in the federal courts and completely vindicated. *Shallenberger v. First State Bank*, 219 U. S. 114; *Noble State Bank v. Haskell*, 219 U. S. 104. The depositors' guaranty fund, as provided for in that act, was created to secure all depositors; and it clearly was germane to that subject to provide that depositors of public funds should be secured thereby, and that different or other security should not be required. Therefore, respondent's contention upon this point is unsound.

In disposing of respondent's contention that the banking act, as amended, is obnoxious to section 11, art. III of the constitution, it may be observed that the banking act is complete in itself, and it has been held that an act complete in itself may so operate on prior laws as to materially change or modify them, without being repugnant to this provision of the constitution. *State v. Page*, 12

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Neb. 386. In *State v. Moore*, 48 Neb. 870, it was said: "It is also firmly established in this state by a long line of decisions that an act complete in itself is not inimical to said constitutional provision, although such act may be repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act. In such case the earlier statute will be construed to be repealed by implication." The rule as thus stated was approved and followed in *State v. Cornell*, 50 Neb. 526. It is also firmly settled by this court that whatever might have originally been made a part of an act may at any time be engrafted upon it by legislation professing to be amendatory. *Richards v. State*, 65 Neb. 808; *State v. Majors*, 85 Neb. 375. It follows that the amended section takes the place in the banking act occupied by the original section, and should be construed precisely as though it had been originally enacted in its amended form. *Cass County v. Sarpy County*, 63 Neb. 813.

Finally, it is contended that the law does not favor repeals by implication, and therefore the banking act, as amended, does not repeal the provisions of the depository act requiring a bond to secure the safe-keeping and return of deposits. It is firmly established in this jurisdiction, by a long line of decisions, that where an act complete in itself is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute will be construed to be repealed by implication. *Smalls v. White*, 4 Neb. 353; *Jones v. Davis*, 6 Neb. 33; *State v. Whittemore*, 12 Neb. 252; *Zimmerman v. Trude*, 80 Neb. 503; *Allan v. Kennard*, 81 Neb. 289.

In conclusion, we are of opinion that the banking act was properly amended, and is not open to the objections urged; that, as amended, that act is clearly in conflict with so much of the provisions of the depository act as requires a bond to secure the safe-keeping and return of public funds, in addition to a full compliance with all of the provisions of the banking act; that such provisions of the

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depository act were repealed by implication; that the judgment of the district court should be, and therefore is,

AFFIRMED.

HENRY STEHR V. STATE OF NEBRASKA.

FILED JANUARY 16, 1913. No. 17,539.

1. **Homicide: CRIMINAL NEGLIGENCE.** One charged with the support and control of a child of tender years, suffering with frozen feet, who negligently and wilfully fails or refuses to obtain for it necessary medical aid, thereby causing its death, may be guilty of such criminal negligence as to render him guilty of manslaughter.
2. ———: ———: **QUESTION FOR JURY.** The degree of negligence in such a case that would make a man criminally responsible can hardly be defined. It is not a slight failure in duty that would render him criminally negligent, but a great failure of duty undoubtedly would. The line between the two extremes is a question that must be left, to a great extent, in each individual case, to the common sense of the trial jury. It is for them to determine whether or not the degree of failure of duty is, in fact, criminal.
3. ———: ———. For a parent having special charge of an infant child to so culpably neglect it that death ensues as a consequence of such neglect is manslaughter, although death or grievous bodily harm were not intended.
4. ———: ———. If the parent has not the means for the child's nurture, it is his duty to apply to the public authorities for relief, and failure to do so is itself culpable neglect, wherever there are public authorities capable of affording such relief.
5. **Criminal Law: INSTRUCTIONS: REASONABLE DOUBT.** An instruction defining a reasonable doubt which commences with the statement that "a reasonable doubt is that state of the case which, after the entire comparison and consideration of all of the evidence, and instructions of the court, leaves your minds in doubt and uncertainty as to the guilt of the defendant," is not rendered prejudicially erroneous by the inclusion of the words "and instructions of the court."
6. ———: ———. Other instructions examined, commented upon in the opinion, and found to be without reversible error.

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7. ———: REFUSAL OF INSTRUCTIONS. Where the trial court has fairly instructed the jury upon the defendant's theory of his case, a refusal of other instructions requested by the defendant is not reversible error.
8. Assignments of error in the admission of evidence examined, and found to be without merit.
9. Evidence examined, its substance stated in the opinion, and held sufficient to sustain a verdict of manslaughter.

ERROR to the district court for Madison county:
ANSON A. WELCH, JUDGE. *Affirmed.*

H. F. Barnhart, M. D. Tyler, William V. Allen and William L. Dowling, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

BARNES, J.

The plaintiff in error, hereafter called the defendant, was convicted in the district court for Madison county of the crime of manslaughter, by negligently causing the death of his stepson, a child about four years of age. He was sentenced to the penitentiary for a term of from one to ten years, and to reverse the judgment of the district court has brought the case here by a petition in error.

It is his first contention that the evidence is insufficient to sustain the verdict. From a careful reading of the bill of exceptions it appears that the defendant is a native of Germany, and prior to his removal to this country resided in the city of Hamburg; that on the 6th day of April, 1909, he was married to one Minnie Loco, who was at that time the mother of an illegitimate child about two years of age, called "Kaurt;" and who, after the marriage, was known as Kaurt Stehr; that in July, 1910, the defendant left his wife, his infant child, and his stepson Kaurt in Hamburg and came to Norfolk, Nebraska; that afterwards, and in the month of October, defendant sent

for his wife and child, with the understanding that the stepson was to be left with defendant's mother in Germany. For some reason, not fully explained, the defendant's mother declined to keep the child, and it was brought, by the defendant's wife, to this country. Shortly after her arrival at Norfolk defendant rented a house and established a home in that city, the family consisting of his wife, their infant child, and stepson, Kaurt. It appears that while in Germany, and after they came to this country, Kaurt was to some extent afflicted with bed wetting, and for that weakness defendant was in the habit of punishing the child frequently and quite severely; so much so that complaint was made against him in Germany, and his friends and neighbors in this country remonstrated with him, and informed him that unless he desisted the child might become idiotic. It should be stated that defendant was without means, except his earnings as a day laborer, and the help furnished him by his wife in laundry work. On the 31st day of December, 1910, there was a severe storm in the vicinity of Norfolk, which is described as a blizzard, and that night the weather was very cold. Defendant allowed the fire to go out altogether, although he had a small supply of coal; and, as stated by him, some time during the night he discovered that Kaurt had wet the bed; that the bedding was frozen stiff; that the room was full of frost; that snow had drifted through the crack of the door and through a broken window pane; and the bedding on all of their beds was frozen stiff. Notwithstanding this situation, defendant built no fire, and, as stated by him, he turned the bedtick, on which Kaurt slept, over, and again placed the child in the bed, alone, where he lay until the next morning. Shortly after this, and as early as the 5th day of January following, it was discovered that the child's feet had been frozen, and had begun to show signs of discoloration. Mrs. Stehr stated that the child's feet looked gray and somewhat green in spots. Defendant thereupon applied hot water and dressed the feet with cloths, saturated with

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vaseline. No physician was consulted or called until the 16th day of January following, at which time the child's feet were so badly decomposed that the stench arising therefrom had become unbearable. Defendant's wife then went to a merchant, with whom they were trading, and inquired for a German doctor. Doctor Pilger was recommended, and he called to see the child, but declined the case because the defendant had no money. Doctor Verges, another German physician, was called, who on the same evening visited the child, and also declined the case, but recommended that the city physician be notified of the situation. On the following day Doctor Tashjean, the city physician, who is a skilful surgeon, called at the defendant's house, examined the child, found a gangrenous condition of its feet, and informed defendant that amputation was absolutely necessary. Meanwhile, one of the county commissioners, who was active in securing assistance for the poor, furnished defendant with a supply of coal and other necessities, and arranged for the amputation. The child was taken to the home of Mrs. Klentz, a professional nurse, and on the following day the operation was performed by Doctors Tashjean and Salter, and everything possible was done for the relief of the child. It was found, however, that sepsis or blood poisoning had developed to such an alarming extent that a recovery was impossible, and on the 22d day of the month the child died.

The indictment charged the defendant with murder in the first degree, which, of course, included the lesser crimes of murder in the second degree and manslaughter. The district court instructed the jury to find the defendant not guilty of first or second degree murder, and the cause was tried and submitted to the jury on the theory that defendant, being charged with the duty to control and support the deceased child, wilfully and negligently caused and permitted its life to be endangered after having knowledge that its feet were badly frozen, and wilfully failed and neglected to summon medical aid or make known its condition, thereby causing its death.

It must be observed that the question actually submitted to the jury was whether or not defendant was criminally negligent in failing to provide medical care for his stepson after he discovered the frozen condition of of the child's feet. It is contended that defendant is an ignorant German, unable to speak the language of this country, was without means to procure medical assistance, and therefore was not responsible for his neglect. The evidence shows, however, that he was a fairly intelligent man; that he was surrounded by his friends and neighbors, all of whom could speak both German and English; that he failed to mention the child's condition, or inform them of his necessities. His own testimony shows that for ten or eleven days he saw the child's feet turn from gray to purple, from blue to green and black, and saw its flesh rotting and dropping away, yet made no effort to procure medical aid until the odor of the rotting flesh became unbearable. It seems idle to assert that he was so ignorant as not to realize the necessity for calling a physician. The degree of negligence in such a case that would make a man criminally responsible can hardly be defined. It is not a slight failure in duty that would render him criminally negligent, but a great failure of duty undoubtedly would. The line between the two extremes is hard to define, and is a question that must be left, to a great extent, in each individual case to the common sense of the trial jury. It is for them to determine whether or not the degree of failure of duty is in fact criminal. As we view the evidence, the jury had a sufficient basis for finding the defendant guilty of such criminal negligence as would amount to manslaughter.

Defendant predicates error on the court's instructions from paragraphs 7 to 17, inclusive. We find that paragraph 7 explains the law as declared in section 43, ch. 34, Comp. St. 1911. It incorporates a part of that section, and, as we view it, is not erroneous. By paragraph 8 of the instructions the jury were informed that "to do an act wilfully is to do it voluntarily." No specific objec-

tions are urged to this instruction. Paragraph 9, defining negligence in the care and control of any child, cannot be rightfully criticised, and the general criticism made by counsel is not available as a ground of error. Defendant was charged with the legal duty of seeing to it that the child's life was not endangered. If he realized the condition of the boy's feet and for ten days failed to call a physician, or if he negligently refused to ascertain the condition of the boy's feet in time to call a physician, then the jury would be justified in finding him guilty of criminal negligence. Paragraph 10 of the instructions informed the jury that a failure to provide for the child under such circumstances is gross negligence; and that it was also gross negligence, if he did not have the means to employ medical assistance himself, in not seeking it from others. Paragraph 11 of the instructions informed the jury that ignorance of the laws providing for the care of poor persons would not excuse defendant from the omission of his duty to procure the necessary medical attention for the deceased child. In such a case, where the party charged is unable to supply the necessary succor, he ceases to be responsible, but this responsibility is not divested in cases where poor-laws exist. In such case the person owing the duty should report the case to the public authorities for their relief. In 1 Wharton, Criminal Law (11th ed.) sec. 484, it is said: "Independently of these statutes, it may be generally stated that for a parent, having special charge of an infant child, to so culpably neglect it that death ensues as a consequence of such neglect, is manslaughter if death or grievous bodily harm were not intended; and murder if there was an intent to inflict death or grievous bodily harm. To constitute murder there must be means to relieve and wilfulness in withholding relief. If the parent has not the means for the child's nurture, his duty is to apply to the public authorities for relief; and failure to do so is itself culpable neglect wherever there are public authorities capable of affording such relief."

It is claimed, however, that, by instruction 11, the jury were told that it was their duty to determine whether or not there was such omission of this duty as shows heedlessness and indifference by the defendant; and it is argued that this instruction is fallacious because its effect was to tell the jury that the defendant was bound, at his peril, to know that there were poor-laws applicable to cases of this kind. This is an erroneous construction of the instruction, for it merely states the old maxim that ignorance of law excuses no one. The defendant was charged with the duty to see to it that the child's life was not endangered; and it is apparent that he could have performed that duty by informing his neighbors of its condition. The testimony shows that, on the day when information was first given to the Norfolk merchant, medical attention and aid of all kinds were immediately forthcoming.

It is strenuously argued that instructions 7, 8, 9, 10 and 11 are in conflict with instruction 14. By this instruction the jury were told that the defendant should be convicted of manslaughter, if they found, beyond a reasonable doubt, that he realized the condition of the child's feet for such a length of time, previous to calling a physician, that by calling such physician the child's life might have been saved; or that he was culpably negligent in not taking steps to know and realize the condition of the child's feet. We are of opinion that there was no conflict in the instructions.

It is also argued that the words, "and instructions of the court," found in instruction 17, defining a reasonable doubt, rendered the whole paragraph erroneous. It should be observed that this case is one where it was the duty of the court by proper instructions to define the degree of negligence which would render the defendant guilty. Therefore it was the duty of the jury to take into consideration the instructions of the court on that question in order to enable them to reach a proper verdict.

Error is also predicated on the refusal of the court to

give certain instructions requested by the defendant. As we view the record, the trial court carefully covered all of defendant's contentions, and the refusal of the request tendered by the defendant was not reversible error.

Finally, it is contended that the court erred in the admission of evidence showing the existence of bruises, scars and marks on the body of the child. It appears that very little of that evidence was objected to by the defendant. In fact, the witnesses for the defense described the condition of the child's body, and the jury were instructed that evidence of that kind should only be considered in determining whether the defendant's attitude toward the child was such as might cause him to be negligent in his failure to secure medical aid after he ascertained that the child's feet were badly frozen.

It is also stated that the newspapers of Madison county were filled with sensational accounts of defendant's treatment of the child at the time of its death, to defendant's prejudice. It appears, however, that the trial took place some nine months after the child died, and it is not apparent that the newspaper statements complained of, in any manner, influenced the jury in arriving at their verdict.

In conclusion, it may be said that the defendant is a man of at least average intelligence; that the people who advanced him the money with which he paid for the passage of his wife and children lived within a stone's throw of his house, he knew them in Germany, and they had helped him; that at every point of the compass his nearest neighbor was a German with whom he could counsel and advise; that they were a thrifty, charitable people, and a word from him would have brought all of the assistance that he needed; and it appears that, as soon as his wants were made known, medical assistance and material aid were immediately brought to him.

As stated by counsel, this is a difficult case, and suggests a seasonable application for executive clemency; but, as we view the record, it contains no reversible error,

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and this court can grant the defendant no relief. The judgment of the district court is

AFFIRMED.

JOHN WITT, APPELLEE, V. OLD LINE BANKERS LIFE INSURANCE COMPANY, APPELLANT.

FILED JANUARY 16, 1913. No. 17,672.

1. **Limitation of Actions: AMENDMENT OF PLEADING.** The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action. *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568.
2. **Contracts: ACTION: BURDEN OF PROOF.** In an action on a written contract where defendant denies plaintiff's allegation that he has performed all of its conditions on his part, the burden is on the plaintiff to sustain such allegation by competent proof.
3. ———: ———: **EVIDENCE: DIRECTING VERDICT.** In the absence of such proof, it is proper for the court to instruct the jury to return a verdict for the defendant.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Reversed.*

Edward F. Pettis, for appellant.

Courtright & Sidner, contra.

BARNES, J.

This case is before us on a second appeal. *Witt v. Old Line Bankers Life Ins. Co.*, 89 Neb. 163. As there said: "This is a suit to recover back an advance premium of \$237.85, paid by plaintiff to defendant on a subsequently rejected application for life insurance." On that appeal a demurrer was sustained to plaintiff's petition, and the cause was remanded for further proceedings. After the mandate was returned to the district court for Dodge

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county, plaintiff was granted leave, over defendant's objections, to file an amended petition, and that ruling, among other things, is assigned as error.

The petition, by way of amendment, alleged that one C. K. Huntington, who signed the written contract on which the plaintiff based his right of action, was the defendant's agent duly authorized to enter into the contract on its behalf. By way of further amendment, it was alleged that plaintiff had complied with all of the conditions and provisions of the contract, and there was set forth certain facts which it was alleged constituted such compliance on his part, and that defendant is now estopped to deny that plaintiff had submitted to a medical examination. The contract, so far as it is material to the controversy, reads as follows: "Received at Scribner, State of Nebraska, this 10 day of August, 1905, of John Witt the sum of two hundred thirty-seven 85-100 dollars, in payment of premium upon \$5,000 policy which he has this day applied for to the Old Line Bankers Life Insurance Company of Lincoln, Nebraska. Policy to date at issue providing said application is approved by said company, otherwise said payment is to be returned to said applicant. It is hereby agreed and understood that a refusal, after being written, on the part of the applicant to submit to a medical examination shall forfeit the payment herein.

* * * (Signed) John Witt, Applicant. C. K. Huntington, Agent." Plaintiff alleged that defendant had neither issued the policy nor returned the premium, and for that reason he sought a recovery.

Defendant, by its answer, admitted that plaintiff paid the premium; admitted the execution of the contract; and denied all of the other allegations of the petition. Defendant further alleged that it had never declined to issue the policy; that it was ready and willing to do so if plaintiff would submit to a proper and suitable medical examination in order that it might determine if the plaintiff was a suitable subject for life insurance; that, if it was so determined, defendant desired to and would issue

the policy, and, if plaintiff was not entitled to the policy, it was ready and willing to return to him the amount of his premium. Defendant alleged that plaintiff, in violation of his said agreement, had refused and still refuses to subject himself to a medical examination; that, until he complied with his agreement, he was not entitled to the policy or return of the premium. Plaintiff's reply, in substance, was a general denial. A trial resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

1. Defendant contends that the court erred in permitting plaintiff to file his amended petition. It appears that the original petition was filed within the statute of limitations, but defendant argues that, by failing to state facts sufficient to warrant a recovery, the petition was a nullity; that the filing of plaintiff's amended petition was in fact the commencement of a new action, which was then barred by the statute of limitations. On the other hand, plaintiff insists that, under the rule announced in *Merrill v. Wright*, 54 Neb. 517, *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, and *Chicago, R. I. & P. R. Co. v. Young*, 67 Neb. 568, the amendment was properly allowed; that the action was commenced by the filing of his original petition, and was therefore commenced in time to avoid the statute of limitations. We are of opinion that this question should be ruled by the decision cited. In the case of *Merrill v. Wright*, *supra*, it was said: "A petition is not necessarily a nullity because it does not fully and properly set out a cause of action and because an objection to it is sustained. The question of whether or not the statute of limitations should prevail against an amendment seems to turn, not upon the correctness of the pleading, but upon the identity of the cause of action sought to be set up. If the cause of action attempted to be set forth in the amended pleading is the same, the fact that it was defectively stated in the first petition will not prevent the application of section 19 of the code, which provides that an action shall be deemed commenced,

within the provisions of the statute of limitations, at the date of the summons which is served on the defendants." In the light of our former decisions, we are of opinion that the district court did not err in permitting the plaintiff to file his amended petition.

2. Defendant also contends that the court erred in refusing to instruct the jury to return a verdict in its favor. An examination of the record discloses that plaintiff declared upon the written contract. No rescission of the contract is alleged, and his sole ground for a recovery is based on his allegation that he had complied with its terms by submitting to a satisfactory medical examination. This allegation was denied by the defendant, and the burden of proof on that question was on the plaintiff. It appears that the contract was signed on August 10, 1905; that on October 21, 1905, defendant wrote plaintiff to the effect that he had not furnished his medical examination, and requested him to do so at once. It further appears that his examination was delayed through no fault of the defendant until February 26, 1906, at which time he was examined by one Doctor Hopper, and the result of his examination forwarded to the defendant. The plaintiff testified, over the defendant's objections, that he fully answered all questions put to him by Doctor Hopper, and that his examination was complete; that Doctor Hopper said to him, when he was through with the examination, "That is all." It appears, however, from the report of the examination that Doctor Hopper found that the plaintiff was slightly afflicted with nephritis, which, as explained, was a disease of the kidneys; that upon an examination of the report the defendant's chief medical examiner was in doubt as to plaintiff's physical condition, and desired a further medical examination; that defendant wrote to Doctor Inches, requesting him to see the plaintiff and ascertain whether his condition was temporary or chronic, and to get a sample of plaintiff's urine. It appears that Doctor Inches talked with plaintiff, and was unable to furnish the required information.

The testimony discloses that, about the 10th of April following, plaintiff wrote to defendant stating, in substance, that he had not received his policy, nor his money, and wanted to know what defendant was going to do about it; that, thereupon, Mr. Wilson, the president of defendant, wrote a letter to plaintiff that his application had not been rejected, because the medical department had not had an opportunity of acting thereon; that the company had asked for further information. That thereafter, and some time in the month of June, the defendant, failing to obtain the information it desired, sent one Doctor Lenhoff to Scribner, who called upon the plaintiff, and informed him that the company had sent him to make a further medical examination. He asked the plaintiff to, submit to such an examination, and requested that he furnish him a sample of his urine. Plaintiff thereupon refused to comply with Doctor Lenhoff's request, and told him that he would have nothing to do with him; that, later on, plaintiff wrote defendant the following letter: "Gentlemen: I have told you before, and you also know, that I have taken one examination, and this is all I ever will take, even if you send a dozen doctors out here every week. I told your man before that I was through with you, and that is all. I will not open any more of your letters. Respect., John Witt."

We think it fairly appears that the defendant was willing at all times to deliver its policy of insurance to the plaintiff whenever he passed a satisfactory medical examination. In fact, defendant notified the plaintiff that if he would take a satisfactory medical examination, and it was found that the company ought not to write the policy on account of his physical condition, it would promptly return to him his advance premium. In our former opinion it was said: "The examination contemplated by the contract was, of course, the requisite medical examination required by all reputable life insurance companies before assuming a risk. On the face of the contract the assurer was not limited to a single examination by the

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physician first designated, like the one pleaded. * * * In the very nature of the policy for which the advance premium was paid, a single examination, if incomplete or unsatisfactory, could never have been within the contemplation of the parties. Safe underwriting forbids such a construction of the contract." It follows that the plaintiff could not rely solely upon the medical examination of February 26, 1906, as a complete and full compliance with the terms of his contract.

As we view the evidence, the plaintiff failed to establish the fact that he had furnished to the defendant a satisfactory medical examination, and had complied with the terms of his contract. It should be observed that time was not the essence of the contract; that plaintiff failed to allege or prove that defendant was guilty of an unreasonable delay in attempting to carry out the agreement, and was not estopped to insist that plaintiff should be required to perform its obligations on his part. We are therefore of opinion that the district court erred in refusing to direct the jury to return a verdict for the defendant.

Defendant assigns many other errors as a reason for a reversal of the judgment, but, in view of what we have already said, it is unnecessary to consider them.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

LETTON, J., concurs in the conclusions only.

REESE, C. J., dissents.

HALE DAVIS, APPELLEE, v. A. O. TAYLOR & SON, APPELLANT.

FILED JANUARY 16, 1913. No. 16,882.

1. **New Trial: AMENDMENT OF MOTION.** A motion for a new trial cannot be amended by assigning new grounds after the statutory time for filing such motion has expired, except upon a finding by the court that the party was unavoidably prevented from presenting the matter contained in the amendment within three days after verdict.
2. **Appeal: NEW TRIAL.** "Questions presented by an amendment to a motion for a new trial, made more than three days after verdict and without a finding of the court that the party was unavoidably prevented from presenting such questions within three days from verdict, will not be considered by this court." *Gullion v. Traver*, 64 Neb. 51.
3. **Bailment: INJURY TO PROPERTY: BURDEN OF PROOF.** As a general rule, when a bailee returns the property bailed in a damaged condition, the burden is upon him to show that the damage did not occur through his negligence, and an instruction embodying this principle is not erroneous.

APPEAL from the district court for Saline county:
LESLIE G. HURD, JUDGE. *Affirmed.*

J. L. Grimm and R. C. Hunter, for appellant.

Bartos & Bartos, contra.

LETTON, J.

This was an action by the keeper of a livery stable to recover the value of a horse which he alleged was injured through the negligence of one of defendant's employees to such an extent that it became worthless. Plaintiff recovered, and defendant appeals.

The assignment that the court erred in giving the third instruction to the jury is not entitled to be considered. The record shows that it was not contained in the original motion for a new trial. It was interlined more than 30

days after the motion had been filed, and without any excuse being offered for the delay. *Gullion v. Traver*, 64 Neb. 51.

By the fourth instruction the jury were told, in substance, that if, while in the exclusive possession of a bailee, the property bailed is injured, the law presumes that such injury occurred through the negligence of the bailee, and the burden of proof is upon such bailee to overcome such presumption. It is contended that this instruction was erroneous, for the reason that such a bailee is not an insurer, but is only chargeable with ordinary care, and that the burden of proving negligence is upon the plaintiff. Where a bailee of a horse, hired to be driven, returns the horse injured in a manner that would most probably be caused by negligent and careless driving, a presumption arises from the very fact of injury that such negligence existed. This fact, in the absence of other evidence, makes out a *prima facie* case for the plaintiff. The instruction recognizes this principle. The only burden placed upon the bailee is that, when it is established that the property was injured while in his possession, he must overcome this presumption by his proofs. It is pointed out in *Bissel v. Harris & Co.*, 1 Neb. (Unof.) 535, that there are exceptions to this rule, and that if the bailee establishes that the injury "occurred through inevitable accident or irresistible force, which do not of themselves import negligence, the burden of proving negligence is upon the bailor." While there is a conflict in the authorities upon this proposition, this is the more modern rule, and the one which we believe to be supported by the better logic. *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295; *Campbell v. Missouri P. R. Co.*, 78 Neb. 479; 3 Am. & Eng. Ency. Law (2d ed.) 750; 5 Cyc. 217.

As to the assignment that the evidence is insufficient, we think there was sufficient to justify the submission to the jury of the questions whether the driver of the team was negligent in driving in a gullied, rough and washed-

out road at the place of the accident, when there were smooth tracks upon either side upon which others had traveled and upon which he might have driven, and whether the breaking of the horse's leg was caused by such negligence and by his manner of driving.

We find no reversible error in the record, and the judgment of the district court is

AFFIRMED.

DOUGLAS COUNTY, APPELLANT, v. PAPILLION DRAINAGE DISTRICT ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,888.

1. **Drains: RIGHT TO CROSS HIGHWAYS: STATUTE: CONSTITUTIONALITY.** Section 24, art. V, ch. 89, Comp. St. 1911, providing as to drainage districts organized under that article that "said district may dig ditches and drains under and across railroads and public highways," is not unconstitutional, as violative of the provision that "the property of no person shall be taken or damaged for public use without just compensation therefor." Const., art. I, sec. 21.
2. ———: ———: **CONDITIONS.** The legislature may grant drainage districts the right to cross highways, and if it imposes no conditions for the exercise of this right the county authorities can impose none.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. Affirmed.

James P. English and George A. Magney, for appellant.

Courtright & Sidner, contra.

LETTON, J.

This is an action brought by Douglas county to restrain the Papillion Drainage District from digging drainage ditches across public roads in Douglas county. No con-

sent was given by the county authorities to cross the roads, and no condemnation proceedings had been had. The injunction was denied, and the county appeals.

The Papillion Drainage District was organized under and by virtue of chapter 153, laws 1907 (Comp. St. 1911, ch. 89, art. V), which contains the following provision relied upon by defendants to give authority to cross public roads without securing the right of way as they must do over private property: "Section 24. Said district may dig ditches and drains under and across railroads and public highways." The county takes the position that section 24 is unconstitutional and void, as violative of the provision of the constitution that "the property of no person shall be taken or damaged for public use without just compensation therefor." Const., art. I, sec. 21. We are of the opinion that this provision of the constitution is not involved. The public roads are not "the property of 'any' person." They are public easements under the full control of the legislature, which may authorize them to be used by other public or *quasi*-public agencies, with or without such restrictions as it may deem proper. Elliott, Roads and Streets (3d ed.) sec. 509 (421). In *Krueger v. Jenkins*, 59 Neb. 641, it is said: "The right in this litigation is one belonging exclusively to the public at large. Neither Douglas county nor its citizens have any peculiar interest in it. A county does not hold the legal title to county roads within its borders; it has no power of disposition over them; it has no proprietary interest in them; in performing the duties with which it is charged in connection with them, it acts as an agent of the state, and in the interests of the general public." *Alt v. State*, 88 Neb. 259. The license to cross the highway given by the legislature was within its powers to grant. The duty, being cast by law upon the defendants to restore the highway, relieves the county from any pecuniary outlay on account of the cutting of the road. The legislature having imposed no condition upon the license to en-

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ter conferred upon the district, we find no warrant for the county authorities to do so.

The judgment of the district court is therefore

AFFIRMED.

JOHN J. BURKE, APPELLEE, v. ANNA WELCH ET AL., APPELLANTS; GEORGE O. BURNS ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,915.

Deeds: REFORMATION. A certain tract of real estate with visible monuments and definite boundaries was pointed out to an intending purchaser, who afterwards received a conveyance erroneously describing the property as being eight feet wider than the tract actually sold. The purchaser took possession and exercised ownership only as far as the true boundary, and made no claim to the eight-foot strip for several years thereafter, the vendor retaining possession and control of the same, and being in possession at the time he sold it, with the remainder of the tract of which it formed a part, to the plaintiff. *Held*, That the fact that there was a mutual mistake in the deed warrants its reformation so that the description may conform to the true intention of the parties.

APPEAL from the district court for Platté county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

Albert & Wagner, for appellants.

Reeder & Lightner, contra.

LETTON, J.

This is an action for an injunction and to reform a deed by correcting the description. The district court found for the plaintiff, and defendants appeal.

In September, 1903, George O. Burns, who was the owner of lots 3 and 4, block 20, Stevens addition to the city of Columbus, conveyed "the east 54 feet of lot 3" to his daughter, Anna, who was about to marry. In July, 1905, the daughter, Anna Poole, and her husband con-

veyed the same premises by warranty deed under the same description to Anna Welch. Each of these lots is 62 feet wide, so that, after the conveyance to his daughter, Burns remained apparently the owner in fee of the whole of lot 4 and the west eight feet of lot 3. In March, 1907, Burns sold and conveyed lot 4 and the west eight feet of lot 3 by warranty deed to John J. Burke. Mr. Burns bought the property about 15 years ago. He erected his house on lot 4, which is a corner lot. There is an alley running north and south through the block, which runs on the east side of lot 3. At the time he gave the property to his daughter he measured 54 feet from the center of the alley, pointed out the dividing line to her, and planted a tree at the west line of the property. Mr. and Mrs. Poole erected a house upon the property and took possession up to this line. The house was rented to Mrs. Welch, who occupied it when she bought the property. Mr. Burns testifies that, just before Mrs. Welch purchased it, she asked him to show her where the line was; that he took a ten-foot pole, went with her to the center of the alley, and measured 54 feet over to the tree, then he went to the south side of the lot, and measured 54 feet; that Mrs. Welch put in a stake at that point, and did likewise at the north end; and that she then said: "That is all right, that is all the ground I want." After Mrs. Welch purchased, Burns mowed the grass on the west of the dividing line. Mrs. Welch built a sidewalk extending from the alley to the line of the tree; Burns built the walk from there on. Afterwards Mrs. Welch filled her lot with dirt up to the east side of the line, and Burns filled in 150 loads on his lots and up to the west side of this line. Plaintiff testifies that in March, 1907, when he bought, he took possession up to the line marked by the tree. He remained in possession for about a year, without any question from Mrs. Welch, and afterwards, when she said he was encroaching, he procured the line to be surveyed by one Gottschalk. She admits she never made any claims as to the eight feet east of the pump before the Gottschalk

survey, and that she did not mow the grass on it. The husband of Mrs. Welch testifies that there was no dispute about the line until after Burke bought the property in March, 1907; that Mrs. Welch never claimed the pump or property west of the mark until after the Gottschalk survey was made.

The complaint of the appellant is that the findings and decree are not sustained by sufficient evidence, are contrary to law, and are inequitable. She argues that the presumption is that the deed expresses the true contract; that, to justify the reformation of a written contract on the ground of mistake, it must appear that the mistake was mutual, and the evidence must be clear, convincing, and satisfactory; and that the court should not correct a mistake and conform an instrument to the intention of parties with respect to boundaries, when to do so will defeat their intention as to the quantity. It is further said that there must be an offer to do equity, and there is no such offer made in this case, and that the action is barred by the statute of limitations. While there is a conflict in the evidence, mainly on account of the testimony of Mrs. Welch who denies the existence of a number of material facts testified to by other witnesses, the great preponderance seems to be with the plaintiff. We think the proof is clear, convincing, and satisfactory that all conveyances were made with reference to the actual boundary line marked upon the ground; that Mrs. Welch, before she completed the purchase, knew exactly what property was intended to be conveyed; that she purchased a specific tract of land with ascertained and marked boundaries; that she took possession only as far as this boundary line, and made no attempt to assert title or to take possession to the west of this until after Burke had purchased from Mr. Burns. These facts bring the case within the power of a court of equity to grant relief. *Austin v. Brown*, 75 Neb. 345, 348.

With regard to the defense of the statute of limitations, the record does not show when the action was be-

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gun, and, so far as we can see, the action seems to have been brought in time.

As to the claim that there is no offer to do equity on account of Mrs. Welch having paid the taxes on the eight-foot strip, the record shows that Mr. Burke offered in open court to pay any taxes that have been levied upon the disputed strip since the time of the deed to Mrs. Welch. This we think is all that it was possible for him to do, since there was no proof offered as to the proportionate share of the taxes levied thereon. It is also said that he has not offered to do equity because he has not offered to pay the value of the eight feet, but this he was not required to do, since Mrs. Welch was never in fact the true owner of this property.

The decree of the district court is clearly right, and is

AFFIRMED.

**RICHARDSON COUNTY, EX REL. MAURICE SHEEHAN ET AL.,
APPELLEES, V. DRAINAGE DISTRICT NO. 1, APPELLANT.**

FILED JANUARY 16, 1913. No. 17,661.

1. **Drains: HIGHWAY CROSSINGS: DUTY TO MAINTAIN.** Under section 23, art. IV, ch. 89, Comp. St. 1911, drainage districts organized under that article are charged with the duty of restoring a public highway which they cross "to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness." *Held*, That this provision does not operate to relieve such districts from the duty imposed by common law and by section 110, art. I, ch. 78, Comp. St. 1911, to "make and keep in good repair good and sufficient crossings on all such roads."
2. ———: ———: **BRIDGES: DUTY TO MAINTAIN.** That where a new channel has been made by the drainage district for a stream which has been bridged by the public authorities, if the new channel and bridge relieve the county of the burden of maintaining the old bridge, the new bridge should be maintained by the public, and not by the drainage district.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Kelligar & Ferneau and A. R. Keim, for appellant.

A. E. Gantt, E. Falloon and C. F. Reavis, contra.

Courtright & Sidner, amici curiæ.

LETTON, J.

This was an application for a writ of mandamus to compel the respondent to erect and maintain suitable bridges and approaches at certain specific localities in Richardson county where the ditches dug by the respondent cross public roads. It is alleged that certain of the bridges built by respondent are too short, that others are out of repair and that the approaches are unsafe.

The answer to the alternative writ "admits that among the duties enjoined by law upon this respondent was to provide suitable bridges and approaches thereto in the highways where the ditches of respondents intersect the said highways, but denies that any law of the state of Nebraska enjoined upon said respondent the duty of maintaining said bridges and approaches thereto after the same have been duly installed by said respondent." It also denies that the bridges constructed by it were too short to span the openings, and alleges that, if the approaches and bridges are now impassable, it is due to flood conditions.

The court found (to quote from appellant's brief) "that the Moritz and Preston bridges were properly constructed by the drainage district; that these bridges were put out of repair by an unprecedented flood; that their consequent want of proper condition for public travel was not due to any omission, fault, or neglect on the part of the drainage district; and * * * the duty of replacing the same in proper condition for public use rested, under the law, upon the drainage district." The appellant admits that the findings of fact made by the court

are supported by sufficient evidence, but denies that the conclusion of law was correct.

A brief has been filed by *amici curia* requesting the court to re-examine the question decided in *State v. Papillion Drainage District*, 89 Neb. 808, 90 Neb. 477. On account of the importance of the question involved, we have devoted much time to a re-examination of the whole subject.

In this state there are a number of separate acts providing for drainage. How far these refer to roads will now be examined. The first act in point of time was passed in 1873, and is now designated as article I, ch. 89, Comp. St. 1911. The only reference to roads in that act provides that the counties must pay the amount of benefits the highway will receive, if any, toward the cost of the ditch. Article II of this chapter provides for drainage by incorporated companies composed of owners of the lands affected, and was passed in 1877. Laws 1877, p. 160. No provision is found in this act referring to roads. Article III, passed in 1911 (laws 1911, ch. 142), is substantially the same as the act of 1873 with reference to public highways. There are no specific provisions in any of these acts allowing ditches to cut or cross public highways. Article IV, passed in 1905 (laws 1905, ch. 161), also provides that railways and highways shall bear their proportionate share of the cost according to benefits, and in specific terms gives authority to cross streets, highways, railways, canals or ditches. Article V was passed in 1907. Laws 1907, ch. 153. The only reference to roads therein is section 24, which provides: "Said district may dig ditches and drains under and across railroads and public highways." This resume shows that, with the exception of ditches dug by districts organized under the acts of 1905 and 1907, the authority to cut and cross highways at all must be derived by implication.

The appellant is organized under the provisions of the act of 1905, as amended. Comp. St. 1911, ch. 89, art. IV. Section 23, so far as applicable, is as follows: "The said

board shall have the power to construct the said works across any street, avenue, highway, railway, canal, ditch or flume which the route of said ditches may intersect or cross, in such manner as to afford security for life and property, but the said board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be intersected or crossed by said works shall unite with said board in forming said intersections and crossings, and grant the privilege aforesaid; and if such railroad company and said board, or the owners and controllers of said property, thing or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land."

Prior to 1887 there appears to have been no general statute in this state regulating the crossing or cutting of highways by corporations or persons having a legal right to do so, or prescribing their duties with respect to restoring the road to its former condition. In that year the legislature passed "An act to compel railroad corporations and others to make and keep in repair crossings." The first section of the act is as follows: "Any railroad corporation, canal company, mill owner, or any person or persons who now own, or may hereafter own, or operate any railroad, canal, or ditch that crosses any public or private road, shall make and keep in good repair good and sufficient crossings on all such roads, including all the grading, bridges, ditches, and culverts that may be necessary within their right of way." The remainder of the act is mainly concerned with the manner of enforcing this duty. Laws 1887, ch. 73; Comp. St. 1911, ch. 78, sec. 110.

At the common law it was ordinarily the duty of the county to erect and repair bridges; but, where a highway was crossed or cut for any purpose by other than highway authorities, it was the duty of those interfering with

the road to restore the same. Quoting from 16 Halsbury, Laws of England, 191: "Where individuals have for their private purposes created a necessity for a public bridge, e. g., by cutting a canal or drain across an existing highway, or by deepening the water at a ford, and have built a bridge in order to enable the public to exercise the right of passage, they must maintain and repair it, at any rate until they abandon their operations and restore the highway to its original condition. This liability is usually expressly imposed and defined, in the case of a statutory undertaking, by the undertakers' special act; but, apart from any special provision, the liability both to build and maintain a bridge attaches where the highway is interrupted, or rendered seriously inconvenient, either with or without statutory authority." See, also, 3 Comyns' Digest (1st Am. ed. B. 2) 34.

In *King v. Inhabitants of County of Kent*, 13 East, T. R. (Eng.) 220, a navigation company having deepened a ford and built a bridge over the same place under authority of a statute giving them power to alter highways or bridges, "leaving them or others as convenient in their room," was held bound to keep the bridge in repair. The identical argument used by appellant here was used in that case, that the burden of repairing public bridges was by general law cast upon the county, and that there is no provision in the navigation act casting the duty upon the company, but Lord Ellenborough said: "But here the statute gives power to the company to take or alter the old highway for their own purposes, upon condition of leaving another passage as convenient in its room; and if they do not perform the condition, they are not entitled to do the act. It is a continuing condition; and when the company thought proper for their own benefit to alter the highway in the bed of the river, so that the public could no longer have the same benefit of the ford, they were bound to give another passage over the bridge, and to keep it for the public." Bayley, J., said: "The act empowered the company to amend or alter such bridges

or highways as hindered the navigation, leaving them or others as convenient in their room; and after altering the bed of the river so as to make it no longer fordable, they could not leave another convenient passage in the highway there without making and keeping up a bridge."

In *King v. Inhabitants of Lindsey, County of Lincoln*, 15 East, T. R. (Eng.) 317, the facts were similar. One of the judges said: "The authority given to the company to make the cut, which rendered the highway impassable without a bridge, must create an obligation in them to erect the bridge, though the word authorize in the act might not of itself create the obligation."

In a later case, *King v. Inhabitants of County of Kent*, 2 M. & S. (Eng.) 513, the facts were that, about 45 years before, a miller had deepened the water of a ford, which was often impassable, through which there was a public highway. He afterwards built a bridge over it, which the public had ever since used. It was held that this case was distinguishable, and that the county was liable to repair because the public had received a direct benefit by the erection of the bridge over the inconvenient ford.

King v. Kerrison, 3 M. & S. (Eng.) 526: Certain commissioners who were authorized to make a new channel for navigation purposes cut through a highway and built a bridge over the channel. It was held that the proprietors, and not the county, were liable to repair. Bayley, J., said: "This differs from the last case of *Rex v. Inhabitants of Kent*; there the county derived a very essential benefit from the bridge; they had before but a passage through the ford, which is always an inconvenient one; but what benefit does this county derive from passing over a bridge instead of a solid highway?" See, also, *Manley, Adm'r, v. St. Helen's C. & R. Co.*, 2 H. & N. (Eng.) 840. The same rule has been almost uniformly applied in the United States. Most of the cases are concerned with the duties of railroad companies, but some with those of canal companies or drainage districts intersecting highways.

In New York where a mill owner who had dug a race across the highway and built a bridge over it was sued by a person injured by reason of the bridge having been allowed to become out of repair, it was held that the person who made the bridge necessary had the burden of maintaining it and was liable for negligence in so doing. *Dyggert v. Schenck*, 23 Wend. (N. Y.) 446.

The supreme court of Massachusetts, in speaking of the duty of a railroad company at a point where it had erected a bridge to carry the public highway across its track, said: "In building the bridge, the railroad company have undertaken to make a safe passage for the road, which existed previously, across their railroad. They dispossess the ordinary officers, charged with the maintenance of public ways, from so much of the way as is necessary to effect this purpose. The statute requires them to keep in repair just what it requires them to construct." *White v. Inhabitants of Quincy*, 97 Mass. 430.

In Kansas, it is held that it is the legal duty of an irrigation company to restore the highways which its ditch intersects with suitable bridges adequate to accommodate all public travel, and this independently of statutory requirement. *State v. Lake Koen N., R. & I. Co.*, 63 Kan. 394. The Kansas statute, however, has the further provision that, when such bridges are constructed, they "shall be and become a part of the public highway, and shall be maintained and kept in repair by the authorities having charge of such highways." If the Nebraska legislature had been equally careful to specify upon whom rested this duty, there would have been no occasion for this controversy.

In Pennsylvania, a railroad company, having changed the location of a public road and erected a bridge over a creek for the new road, refused to repair and maintain it. It was rebuilt by the township, which brought an action to recover the cost of the bridge. It was held that, the company having originally built the bridge to meet the necessity of the public, the duty devolved upon it to main-

tain and repair it—citing *Woodring v. Forks Township*, 4 Casey (Pa.) 355, to the effect that, where the owner of land cuts a ditch across a public road for his own purpose, he is not only bound to build a bridge, but to maintain it perpetually thereafter. *Pennsylvania R. Co. v. Borough of Irwin*, 85 Pa. St. 336.

It is held in Illinois that any person or corporation that cuts through a highway for its own benefit must furnish to the public a proper crossing. *Haines v. People*, 19 Ill. App. 354; *People v. Chicago & A. R. Co.*, 67 Ill. 118. And the drainage statutes did not change this obligation. *Commissioners of Lake Fork Special Drainage District v. Biggs*, 134 Ill. App. 239; *Commissioners of Highways v. Commissioners of Lake Fork Special Drainage District*, 246 Ill. 388. See, also, on the general subject, 1 Elliott, Roads and Streets (3d ed.) sec. 48 (41); *Perley v. Chandler*, 6 Mass. 453; *Wayne County Turnpike Co. v. Berry*, 5 Ind. 286; *Board of Commissioners v. White Water Valley Canal Co.*, 2 Cart. (Ind.) 162; *City of Moundsville v. Ohio R. R. Co.*, 37 W. Va. 92; *People v. Fenton & T. R. Co.*, 252 Ill. 372.

Returning now to a consideration of our statute of 1887, it is apparent that it is merely declaratory of the common law, and that the same common-sense reasons which led both the English and American courts to the conclusion in the opinions cited were the impelling motives to the enactment of the Nebraska statute. The statute was considered with relation to railways in *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412, and in *Missouri P. R. Co. v. Cass County*, 76 Neb. 396, and was held to apply to highways laid out after the construction of the railroad, as well as to those established and in use before the road was built. In *Nuckolls County v. Guthrie & Co.*, 76 Neb. 464, it is held that, under this statute, the duty to maintain bridges over a millrace on a public highway is upon the mill owner, and that the duty is a continuing one. See, also, *Franklin County v. Wilt & Polly*, 87 Neb. 132.

It is contended that, the drainage district being a public corporation, the statute does not affect it, and, further, that, since the drainage works are for the public benefit, the reasoning of the common law based upon the private advantage to the owner of a mill, a canal, or a railroad does not apply. While a scheme of drainage in this state must be "conducive to the public health, convenience and welfare," as the statute requires, in order to warrant the exercise of the police power in its behalf, yet for pecuniary benefit to the incorporators such districts are usually formed. It would be difficult to find a sufficient number of altruistic individuals to form a district and bear its burdens and expenses without the pleasing prospect of future benefit in increased productivity of the lands affected or by enhancement in their value. Private advantage is the mainspring of the movement, and the same reasons exist whether the form of the controlling authority be public or private. Without doubt the legislature has the power to apportion among public corporations concerned with the roads the duty to maintain the same, and, if it so decide, to take the burden of erecting and maintaining bridges away from drainage districts and place it upon the public at large, but we are of the opinion that it has not done so by the act under consideration.

While not passing upon the point of constitutionality, the language of Judge SULLIVAN in the opinion in *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1, suggests a query: "Why should these companies be put in a class by themselves and be given immunity from the burdens which all others, under similar conditions, are required to bear? Their ditches are not, by the section in question, segregated from other private ditches on account of any peculiar characteristics which they possess. The legislation is manifestly as appropriate to the class excluded as to the class included; and the only reason we can discover for diverse legislation with respect to them is the arbitrary and insufficient one of ownership. The obvious

purpose of the legislature in dealing with both classes was to secure to the public safe and substantial bridges across private ditches, and there was no more reason for exempting some proprietors from the expense of maintaining their bridges, because engaged in the business of irrigation, than there would be for exempting others who used their ditches to drain wet lands or to protect inclosures."

There is, however, another consideration which merits attention. The district is given power to change the channel of streams. In so doing, it is probable that, either at the time of the change or afterwards as the new channel scours and washes and the old fills up, the necessity of maintaining bridges over the old channel ceases. There is a public benefit in the new construction. To maintain the new bridge would impose no greater burden on the public authorities than to maintain the old one, and the straightening of the channel and prevention of floods would undoubtedly tend to lessen the damages which public roads and bridges would suffer from such conditions. *Dygert v. Schenck*, 23 Wend. (N. Y.) 446. In such case the reasoning of the case of *King v. Inhabitants of County of Kent*, 2 M. & S. (Eng.) 513, applies. The public having been compelled to bridge the stream at the old channel and maintain the bridge, if the necessity for its upkeep ends, should be compelled to assume the burden of keeping up the necessary crossing over the new channel. *State v. Chicago, B. & Q. R. Co.*, *supra*, recognizes this principle.

The dominant note running through all the cases is the preservation of the highway. In the old days the pack horse, the stage coach, and the wagon were the only instrumentalities of commerce on land, and the maintenance of the highway was essential to free intercourse. Hence, the care to protect it, to enforce the duty of repair, even by indictment and by penalties for its obstruction. While the railroad lessened the use of the roads for extended journeys, public interest in their preservation

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now exists in a growing degree since the automobile and the tractor are to be found upon every highway.

It is claimed that the provisions of section 23 cover the whole subject of the rights and duties of the district with relation to public roads, and that, being a special act, it limits and controls the act of 1887. We do not so understand it. It is declaratory of the duty to restore the highway, and is, equally with the act of 1887, consistent with the common law. As we have seen, similar language has been so interpreted by other courts.

The judgment of the district court is warranted by the law and the facts. It is therefore

AFFIRMED.

**PHILIP FASSLER, APPELLANT, v. RUDOLPH STREIT ET AL.,
APPELLEES.**

FILED JANUARY 16, 1913. No. 16,872.

1. **Bills and Notes: NEGOTIABLE INSTRUMENTS ACT.** The negotiable instruments act (Comp. St. 1905, ch. 41) does not apply to negotiable instruments executed and delivered before it went into effect.
2. ———: **ASSIGNMENT: DEFENSES.** While an assignment indorsed on the back of a mortgage or on a separate slip of paper may be effective to transfer the equitable title to the note secured, it is not a commercial indorsement cutting off defenses which would have been available to the maker of the note in a suit against him by the original payee.
3. **Evidence: DECREE: ADMISSIBILITY PENDING APPEAL.** Where the giving of a supersedeas bond and the perfecting of an appeal stay proceedings until there has been a trial *de novo* in the appellate court, the superseded decree, pending appeal, is not admissible in evidence to prove a final adjudication binding on the parties or determining their rights.
4. ———: ———: ———. Where a party whose rights are affected by a decree in a former suit pleads, in a subsequent action, that the decree is not final and that he intends to appeal, and introduces in evidence a supersedeas bond obligating himself to prosecute his appeal to effect without delay, he cannot, in such a state of his pleadings and proof, use the superseded decree as evidence of a

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final adjudication binding on the parties or determining their rights.

5. **Appeal: EVIDENCE: REVIEW.** The supreme court must consider an appeal on the evidence before the trial court, except in the rare instances where new matter arising after the entry of judgment is brought into the case by supplemental proceedings.
6. ———: **NEW EVIDENCE.** After an appeal has been taken from the district court to the supreme court, new facts of which the trial court had no knowledge will not be introduced into the record by judicial notice.
7. **Evidence: JUDICIAL NOTICE: RECORDS.** While a court will take judicial notice of its own records, it will not in one case take judicial notice of the records in another case.

APPEAL from the district court for Webster county:
HARRY S. DUNGAN, JUDGE. *Reversed.*

Bernard McNemy, for appellant.

L. H. Blackledge and E. U. Overman, contra.

ROSE, J.

This is a suit to foreclose a mortgage for \$1,300 on a quarter-section of land in Webster county. The note secured was executed February 16, 1904, and by its terms matured March 1, 1909. A payment of \$300 was made June 13, 1906. Andrew P. Johnson was payee, and Rudolph Streit and Amelia Streit were makers and mortgagors. Philip Fassler is plaintiff, and pleads that the note was assigned in good faith by the payee to V. S. Hall, June 17, 1907, and by the latter to plaintiff, November 7, 1907, and that he is an innocent holder without notice of any defense. Mortgagors are defendants. June Paulson, Martin Paulson, Carrie Paulson, Nels Paulson, Mary Paulson and Lena Peterson are joined as defendants, and it is alleged that they claim some interest in the mortgaged premises, but that it is inferior to plaintiff's lien.

In his answer Rudolph Streit admitted the execution

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of the note and mortgage and the payment of \$300, as pleaded by plaintiff, but denied other allegations of the petition, including the *bona fides* of the transfers. He also pleaded that the note and mortgage were given by him in part payment of the purchase price of the mortgaged land; that he purchased it from Johnson, who executed and delivered to him a warranty deed, but that thereafter, and before any actual or pretended transfer of the mortgage, the Paulsons and Lena Peterson set up a claim of title adverse to that of Johnson and his grantee, and in the district court for Webster county an action was instituted wherein the Paulsons were plaintiffs and Lena Peterson and the Streits were defendants; that, upon Streit's answer and cross-petition therein, Johnson and Hall were made parties, and the latter, after having been served with summons, defaulted; that upon issues joined and tried in the former suit it was decreed that the Paulsons had an interest in the mortgaged land adverse to that of Johnson and his grantee, and that collection of the note and enforcement of the mortgage be enjoined pending an accounting between Johnson and his grantee as to the damages on account of the covenants of seizin and warranty in Johnson's deed. It is further alleged in Streit's answer herein that the decree in the former suit was rendered September 24, 1909, and has not become final as to the parties affected by it; that the time for appeal therefrom has not expired; that he is proceeding to perfect an appeal therefrom to the supreme court. In the answer it is also alleged that Hall and plaintiff herein, before the making of the assignments pleaded by the latter, knew of the adverse claims of the Paulsons and of the pendency of their action, and of the liability of Johnson to his grantee, and of the latter's right and intention to recoup his loss out of the mortgage indebtedness, in the event it should be finally adjudged that Paulsons had an interest in the mortgaged land; that plaintiff knew Johnson to be a non-resident of the state. In a reply allegations of new matter in the answer were

denied. For the purposes of this appeal reference to the pleadings of other parties seems to be unnecessary. Upon a trial of the foreclosure suit, the petition was dismissed April 16, 1910, and plaintiff has appealed.

Plaintiff argues there is error in the dismissal of his suit to foreclose the mortgage, because the petition, the evidence, and the findings of the trial court show, as he asserts, that he is a *bona fide* holder of the note for value before maturity, without notice of defenses thereto, and that, therefore, any defense pleaded is unavailing. Do the assignments pleaded amount to commercial indorsements protecting plaintiff as a *bona fide* holder? There is no indorsement of a transfer of any kind on the note. It is payable to "Andrew P. Johnson or order," and his assignment appears on the back of the mortgage in the following form: "Berkley, June 17, 1907. For and in consideration of the sum of One Thousand (\$1,000) Dollars to me in hand paid, receipt of which is hereby acknowledged, I have this day assigned all my right, title and interest in the within described property to V. S. Hall of Bladen, Nebraska. Andrew P. Johnson."

What is relied upon by plaintiff as an indorsement to him was written with a pencil on the back of a deposit slip of the Exchange Bank of Bladen, Nebraska. At the time, Johnson was in California, and the note was in Hall's bank at Bladen. The writing is as follows: "June 18, 1907. Purchased of A. P. Johnson Streit Mort. & note. \$1,300. Nov. 9, 1907. Sold same to P. Fassler. V. S. Hall."

Referring to the transfers of the note, the trial court found that a formal assignment was made by payee on the back of the mortgage; that the note was not attached to the mortgage and assignment; that the note and mortgage were kept together, but were not physically united or attached to each other; that payee made no indorsement on the note; that no assignment of the mortgage was made by Hall to Fassler; that the note was not indorsed by Hall, but that on a separate piece of paper he made a

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notation of the sale of the note and mortgage to Fassler, and signed the same; that the notation was placed with the note and mortgage, but not physically attached thereto, and the three instruments were delivered to plaintiff; that, there being no indorsement on the note or on a paper attached thereto, it is subject to any defense the makers may have against the payee.

Notwithstanding these findings, plaintiff insists he is a holder in due course within the meaning of that part of the negotiable instruments law which declares: "The indorsement must be written on the instrument itself, or upon a paper attached thereto." Comp. St. 1905, ch. 41, sec. 31. Plaintiff insists that the papers were attached, and that he is entitled to protection as an innocent holder, since the trial court, in addition to the findings already mentioned, found that Hall purchased the note and mortgage June 18, 1907, for a good and valuable consideration, without notice of any defense, and that plaintiff likewise purchased them in November, 1907. If plaintiff is correct in asserting that the papers were attached, within the meaning of the negotiable instruments law, and if the language quoted changed the law merchant, questions not decided, the point, as argued, is nevertheless not well taken, because that statute is inapplicable. It went into effect, according to its terms, August 1, 1905. Comp. St. 1905, ch. 41, sec. 198. The note was executed and delivered at an earlier date, namely, February 16, 1904. The act declares: "The provisions of this chapter do not apply to negotiable instruments made and delivered prior to the taking effect hereof." Comp. St. 1905, ch. 41, sec. 193. The rights of the parties must therefore be determined according to the law in force prior to the enactment of the negotiable instruments statute. *Dorsey v. Wellman*, 85 Neb. 262.

Independently of the statute, were the assignments commercial indorsements protecting plaintiff from the defenses pleaded? It has been distinctly held that an assignment indorsed on the back of a mortgage, though

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it may operate as an equitable transfer of the note, does not cut off defenses which would be available to the maker in a suit by the original payee. *Doll v. Hollenbeck*, 19 Neb. 639; *Colby v. Parker*, 34 Neb. 510; *Gaylord v. Nebraska Savings & Exchange Bank*, 54 Neb. 104; *Sackett v. Montgomery*, 57 Neb. 424; *Nebraska Nat. Bank v. Pennock*, 55 Neb. 188. In the case last cited it was held: "A transfer by an instrument separate from, and independent of, the note, while it operated to convey the title, did not cut off equities or defenses, as would have been done had this negotiable note been regularly indorsed."

Plaintiff contends, however, that the assignments and the note were kept together, that they were attached, and that they should not be considered as separate instruments. It is true Hall testified, in reference to his assignment on the deposit slip, that it "was made out and 'attached' to the paper at the time of the purchase of the mortgage;" but, when all the testimony is considered, it is apparent he used that word in the sense that, when the papers were kept together, he understood they were "attached." This seems to be the proper interpretation of his testimony, when other evidence shows the trial court properly found that the deposit slip was not physically attached to the note or mortgage. It seems equally clear that neither the deposit slip showing Hall's transfer nor the mortgage on which Johnson's assignment was indorsed can be considered an allonge, since it appears that there was nothing on the back of the note except a credit of \$300, and that therefore there was no necessity for an additional slip for indorsements.

It is further argued that the dismissal of the foreclosure suit is erroneous, because there is no competent evidence that Streit was evicted, or that he surrendered possession of the land purchased by him from the mortgagee, or that the consideration for the note failed. Plaintiff's argument on this point has not been successfully refuted. It is not even asserted that Streit was evicted

or that he surrendered possession. The only proof that his title failed is found in the decree in the suit by the Paulsons to quiet their title. This decree, when received in evidence, was inadmissible for the following reasons: Streit alleged in his answer herein that the decree had not become final, that the time to appeal had not expired, and that he was proceeding to perfect an appeal to the supreme court. He is bound by these averments. In addition, he introduced in evidence a properly executed supersedeas bond reciting his intention to appeal and obligating himself to proceed without delay. The effect of the supersedeas bond was to suspend proceedings under the decree. There is nothing in the record to show that his appeal was not prosecuted according to his declared purpose and to the obligation of his bond. In *Riley Bros. Co. v. Melia*, 3 Neb. (Unof.) 666, this court, in an opinion by BARNES, C., announced the following rules:

"The perfecting of an appeal to this court from a decree of the district court in a suit in equity, together with the filing and approval of a supersedeas bond, operates to suspend such decree, and the case is thereupon pending here for trial *de novo*.

"By the perfecting of such appeal the parties are placed in the same situation, and their rights are the same, as they were at the time of the commencement of the action."

While the decision in that case appears to go further than the opinion in the earlier case of *Creighton v. Keith*, 50 Neb. 810, this language is used therein: "A decree is affected by an appeal no further than that proceedings are stayed pending the review, where there has been filed a proper bond, and perhaps the decree is not admissible as evidence."

Under the practice in this state, pleadings, in an appeal in equity, may, under some circumstances, be amended in the supreme court, and the decree of the trial court may be affirmed or modified or reversed, or a different decree may be rendered, after a trial *de novo*. In

jurisdictions where a supersedeas and an appeal have the effect of staying proceedings in the trial court and of bringing up the entire case for a trial *de novo*, the rule generally sanctioned is that the decree, pending appeal, is not admissible as evidence of a final adjudication binding on the parties or determining their rights. *Day v. De Jonge*, 66 Mich. 550; *Souter v. Baymore*, 7 Pa. St. 415; *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23; *Sharon v. Hill*, 26 Fed. 337; *Haynes v. Ordway*, 52 N. H. 284; *Byrne, Vance & Co. v. Prather*, 14 La. Ann. 663; *Small v. Huskins*, 26 Vt. 209; *In re Blythe*, 99 Cal. 472; *Sherman v. Dilley*, 3 Nev. 21; *Griffin v. Seymour*, 15 Ia. 30. In *Glenn v. Brush*, 3 Colo. 26, the supreme court of that state said: "The object of a writ of error is to review and correct an error of law, and it is no bar to further proceedings, unless bond and security is given; when that is done the writ operates as a supersedeas; the party cannot afterward proceed to execute his judgment until the appellate court has rendered its judgment thereon. The judgment of the court below in the meantime is suspended; and a suspended or inoperative judgment is not evidence of title. It is suspended for all purposes until affirmed or reversed by the supreme court. If affirmed, it is binding; if reversed, it is a nullity. We are aware there are decisions at variance with this opinion, but it is fully sustained by authority and reason."

Streit, having alleged in his answer that the decree was not final and that he intended to appeal, having executed and introduced in evidence a supersedeas bond, and having offered no proof to show that he had abandoned his appeal or that it had not in fact been taken, or that it had been perfected and dismissed, or that the decree had been affirmed, should not have been permitted to introduce it as evidence of a final adjudication, or of an estoppel, or of a final determination of the rights of the parties. There being no other proof to show that his title failed, the dismissal is not supported by evidence.

To avoid the effect of pleading and proof that the de-

cree was not final, that Streit intended to appeal and that he executed a supersedeas bond, he now asks this court to take judicial notice of its own records which, he says, show that no transcript for an appeal was ever filed here and that the time for appealing has expired. For two reasons this course cannot be pursued: (1) It is a fundamental principle of appellate procedure that courts of last resort must determine an appeal on the evidence before the trial court, except in the rare instances where new matter arising after the entry of judgment is brought into the case by supplemental proceedings. It was not the duty of the trial court, contrary to the alleged purpose and absolute right of Streit to appeal, as shown by his answer and by the recitals in his supersedeas bond, to assume, or to take judicial notice, that no appeal had been, or would be, taken. The reviewing court should not by judicial notice introduce into the record facts of which the lower court had no knowledge. Any other rule would be manifestly unfair to the trial court and to the parties, who are entitled to a full and impartial hearing in the court of original jurisdiction. (2) While a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. *Allison v. Fidelity Mutual Fire Ins. Co.*, 74 Neb. 366; *Gibson v. Buckner*, 65 Ark. 84; *Ralphs v. Hensler*, 97 Cal. 296; *Downing v. Howlett*, 6 Colo. App. 291; *Streeter v. Streeter*, 43 Ill. 155; *Enix v. Miller*, 54 Ia. 551; *Thayer v. Honeywell*, 7 Kan. App. 548; *Anderson v. Cecil*, 86 Md. 490; *Banks v. Burnam*, 61 Mo. 76; *Daniel v. Bellamy*, 91 N. Car. 78; *Grace v. Ballou*, 4 S. Dak. 333; *Goodwin v. Harrison*, 28 Tex. Civ. App. 7; *McCormick v. Herndon*, 67 Wis. 648.

In another respect, the answer and the proof are insufficient to justify the relief granted to Streit. He did not fully show that there was a total failure of consideration for the note, or that the damages resulting from the original payee's breach of covenant equaled or exceeded the amount due on the note. For the errors

pointed out, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., concurring.

The first assignment, as introduced in evidence, does not assume to assign the note at all. It simply assigns the mortgagee's interest in the land mortgaged. The second paper introduced in evidence was clearly in its form and wording not intended as an indorsement of the note, and that I suppose is the real test. If there had been no room upon the back of the note for a regular indorsement, and a paper was attached purporting and intended as an indorsement, then plaintiff might have been an innocent purchaser.

The findings of the trial court upon the question whether plaintiff is a *bona fide* holder without notice are inconsistent, unless we very liberally construe the first and seventh findings. The sixteenth finding is that the note, not being indorsed in writing or on a paper attached thereto, is subject to any defense that the defendants might have against the original payee, and the decree is based upon that theory; therefore, in the first and seventh findings the court must have meant the plaintiff had no actual notice, and did not refer to the notice that follows from the fact that the note was not indorsed.

The findings of the trial court will not support the judgment dismissing the action. There are no findings as to values or damages, and, of course, if the plaintiff has any interest in the property his action ought not to be dismissed. The case at bar involves the same questions that were presented and litigated in the former action, and, if that former action was not finally determined at the time that the case at bar was tried in the lower court, that court should have continued the case at bar until the former action was finally determined, and then should have rendered his decree accordingly. The case being in

equity and all the parties interested before the court, the court in rendering a final decree should have disposed of the whole matter and fixed and enforced the rights of all the parties.

There is considerable discussion in the briefs as to whether an action, or rather a claim, like that of Mr. Streit, could be presented and litigated before he had been evicted from the premises. Johnson sold him the land and took a mortgage back, and is now trying to foreclose that mortgage. He invokes the powers of a court of equity and should do equity. The question as to the form of a warranty, and whether there must be an eviction pleaded and proved, is immaterial in the case. It would not be doing equity on the part of the plaintiff to sell Streit or his grantor a piece of land and take a mortgage back, and then foreclose the mortgage and take the land and not allow Streit to defend, because he, Streit, had not been evicted. According to the allegations of the petition, the first action was begun before Johnson sold the mortgage itself, and the man Hall, to whom Johnson sold the mortgage, was made a party and duly served with process. He was holding it as a bailee for Johnson, and he could not buy it as an innocent purchaser after that.

In the former action it was found that Streit's title had in part failed, and by the decree he was subrogated to a mortgage which appears to be prior to the title of those who were successful in attacking Streit's title, so that they could not take the land away from Streit without paying the prior mortgage. Clearly, the court in the case at bar should not allow Streit to be foreclosed and removed from the land without hearing and adjudicating his counterclaim. The old mortgage would inure to the benefit of the plaintiff, and the court should, if necessary, have the interest of the parties who were claiming the land against Streit sold under the old mortgage; that is, the court should determine the whole matter and take such action as would, as far as possible, protect all of the

innocent parties, and place the loss, if any, where it belongs.

LA FAYETTE PIERCE, APPELLEE, v. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JANUARY 16, 1913. No. 16,883.

1. **Street Railways: VEHICLES: RIGHTS AT STREET INTERSECTIONS.** At a street intersection, neither the operator of a street car nor the occupant of a private conveyance has a superior right to cross, but each must exercise his right and perform his duty with due regard to the safety and convenience of the other, and both must act in a reasonable and careful manner.
2. ———: **NEGLIGENCE: EVIDENCE.** Proof of the running of a street car at an excessive speed across a public street, or of the failure to give proper warning of its approach, is evidence tending to show negligence.
3. ———: ———: ———. In a suit against a street car company for negligently running a street car into a buggy at a public crossing, proof that the car ran more than 150 feet after the collision before it could be stopped, though the brake had been firmly applied, is evidence tending to show excessive speed.
4. **Witnesses: COMPETENCY.** "A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving." *Omaha Street R. Co. v. Larson*, 70 Neb. 591.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Clark & Allen, for appellant.

Flansburg & Williams, contra.

ROSE, J.

While plaintiff was driving east in the city of Lincoln across Twenty-seventh street where it is intersected by Q street, the buggy in which he was riding was struck by a north-bound street car on defendant's track, and he was seriously injured. This is an action to recover resulting

damages in the sum of \$10,000. The negligence imputed to defendant consisted in its running the car at an excessive rate of speed, and in failing to ring a bell or sound a gong or otherwise give notice that the car was approaching the crossing. The answer of defendant contained a denial of the negligence charged, and a plea of contributory negligence on part of plaintiff. From a judgment on a verdict in favor of plaintiff for \$1,625, defendant appealed.

The sufficiency of the evidence to raise a question for the jury or to sustain the verdict is assailed in different forms and is the principal question argued. Is plaintiff defeated as a matter of law? Defendant has two street car tracks running north and south on Twenty-seventh street, where the accident occurred. On the west track the cars run south and on the east track they run north. About the time plaintiff, while going east on Q street, entered the intersection at Twenty-seventh street, a south-bound car on the west track passed in front of him. He did not stop at the crossing, but pursued his course eastward, and a street car running north down a slight grade on the east track struck the rear axle of his buggy. After discussing the evidence at considerable length, counsel for defendant said: "When the plaintiff drove into the intersection, the car going north must have been in sight. If he had looked, he could, and would, have seen it, and he cannot excuse himself by saying that he looked and it was not there, when the very physical situation itself shows beyond dispute that it was there." The deduction of defendant seems to be that, if plaintiff looked, as he said he did, he saw the car; or, if he did not look, he failed to exercise ordinary care; and, in any event, he drove in front of the approaching car and the injury was the result of his own negligence. Is the position thus taken by defendant tenable? In determining whether plaintiff made a case for the jury, or whether the evidence is sufficient to sustain the verdict, the relative rights and duties of the parties,

a public street at a crossing, must be considered. Plaintiff was familiar with the location and with the ordinary and usual movement of electric street cars at Twenty-seventh and Q streets. There is a public crossing there, where passengers get on and off street cars. At a street intersection, neither the operator of a street car nor the occupant of a private conveyance has a superior right to cross. They cannot occupy the same space at the same time, and one must exercise his right and perform his duty with due regard to the safety and convenience of the other. Both must act in a reasonable and careful manner. *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209; *Olney v. Omaha & C. B. Street R. Co.*, 78 Neb. 767; *Omaha Street R. Co. v. Cameron*, 43 Neb. 297.

Plaintiff testified that, when he was within 12 or 15 feet of the west track, a car from the north passed in front of him; that his horse was jogging along at the rate of 5 or 6 miles an hour and did not stop; that, when a little nearer the west track, he looked north and saw no car, and immediately looked south and saw nothing but the retreating car 6 or 7 rods away, where it obstructed his view; that, when approaching the tracks, he looked both ways and listened; that, when his horse's feet were over the first rail, he espied a car coming from the south and thought it was about 7 rods away; that it was running at the rate of 30 or 35 miles an hour; that, when he first saw the north-bound car, he thought he could cross the track ahead of it, and that he urged his horse with a whip. Further narration of plaintiff's testimony in considering the sufficiency of the evidence is unnecessary. The motorman testified on behalf of defendant that he passed the south-bound car near the alley between Q and P streets, while sounding the gong; that he was running 12 or 15 miles an hour; that he did not see plaintiff until within a car's length of him; that he immediately applied the brake, but could not prevent the collision. Plaintiff and the motorman were the only eye-witnesses, but others heard the report of the impact. One witness testified

that he heard a sharp crash, followed by the sound of the pounding and bouncing of wheels on the track, as if the brakes had been quickly and firmly set, and that after the collision the car ran more than 150 feet past the intersection before it stopped.

Plaintiff's evidence tends to prove that in the nighttime the car, without sound of bell or gong, running down grade at the rate of 30 or 35 miles an hour, approached the intersection at a public crossing, where the rights and duties of pedestrians and occupants of private vehicles are the same as those of defendant; and the proofs of defendant tend to show that the car approached the crossing at the rate of 12 or 15 miles an hour, and that the motorman in charge made no effort to slacken its speed until it was within a car's length of plaintiff. At a street crossing, the running of a street car at an excessive speed, or without giving proper warning of its approach, is evidence tending to show negligence. *Stewart v. Omaha & C. B. Street R. Co.*, 83 Neb. 97. Proof of the distance the car ran, with the brake firmly set, after the collision, was evidence tending to show excessive speed. *Indianapolis Street R. Co. v. Bordenchecker*, 33 Ind. App. 138.

Plaintiff's explanation why he did not see the north-bound car sooner, as deducible from his testimony, is that it was obscured by the south-bound car when he first looked south. At that time, according to his proofs, it was about seven rods away. Whether his testimony was worthy of belief and whether he was justified in attempting to cross the track when there was no car within that distance were questions of fact for the jury. He said he thought, when he first saw the car, that he could cross the track ahead of it by urging his horse. He used his whip promptly and made the attempt. That he was almost across when his buggy was struck is not disputed. Had the car been running a little slower, the evidence indicates he would have crossed in safety. Under the proofs outlined, the issues were for the jury. *Omaha*

Street R. Co. v. Mathiesen, 73 Neb. 820; *Stewart v. Omaha & C. B. Street R. Co.*, 83 Neb. 97, 88 Neb. 209.

Defendant also argued that the trial court erred in permitting plaintiff to testify to the speed of the car. It is insisted that the car was coming directly toward him, and that he had no opportunity or time for comparison with other objects and could make no reasonable estimate of speed. This is not a necessary conclusion. When he first saw the car he was not, according to his own testimony, directly in front of it. He said he saw the headlight and the moving car itself, when it was within about seven rods of him, and that he was not excited. He testified, without objection, that he knew the car was running rapidly, and he had already stated that he was familiar with the location and with the ordinary movement of cars at the place of the accident. He further said he had been a locomotive fireman, was accustomed to observing the speed of cars, and could tell from his experience and observation about how fast this particular car was approaching. When asked for the rate of speed, he answered: "Thirty or 35 miles an hour." His testimony seems to be admissible under the following rule: "A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving." *Omaha Street R. Co. v. Larson*, 70 Neb. 591; *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209. The weight of plaintiff's testimony, under all the circumstances proved, was for the jury. He did not assume to be technically exact about distances, or about the speed of the car, or about the rate at which he was himself traveling, and said so on the witness stand. An effort to discredit his story by mathematical demonstration based on his estimates, which were intended to be approximately correct only, is inconclusive.

A number of rulings in giving and in refusing instructions are criticised, but in these respects no error requiring a reversal has been found.

AFFIRMED.

SEDGWICK, J., dissenting.

The opinion does not discuss or state the errors assigned upon the instructions of the court. It says: "In these respects no error requiring a reversal has been found." The brief says that a part of the tenth instruction given by the court was: "Where one knowingly assumes or takes a place of danger, he thereby assumes all the risk of danger incident thereto. The question is whether, when the plaintiff attempted to cross the track, he knew he was in danger in attempting to do so, and negligently and recklessly went ahead in the attempt." This seems to be a very important instruction in this case. If he took no pains whatever to learn whether he was in danger or not, and drove, without looking, on the track in front of the car, he would not know he was in danger, and he would not be negligent under this instruction. It seems to me that the error here complained of is worthy of consideration.

HAMER, J., dissenting.

The tenth instruction is complained of. It reads: "Where one knowingly assumes or takes a place of danger, he thereby assumes all the risk of danger incident thereto. The question is whether, when the plaintiff attempted to cross the track, he knew he was in danger in attempting to do so, and negligently and recklessly went ahead in his attempt. A driver on the streets has the right to assume cars on the street railway tracks are moving at their usual and ordinary rate of speed, and that those in charge of the car are exercising reasonable care to avoid collisions." I am under the impression that this instruction should have been further elaborated so that it would contain an expression of the idea "that, if he did negligently and recklessly go ahead, he should not be allowed to recover." The instruction as given loses sight of the idea suggested, and excuses the plaintiff for bringing about his own injuries by reason of crossing the track

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when danger was apparent. Some such language as I have suggested should have been between the third and fourth sentences in the instruction given. In any event, the instruction as given is defective and calculated to mislead the jury.

JACOB J. VAN VALKENBERG ET AL., APPELLANTS, v. JACOB S. RUTHERFORD ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,913.

1. **Evidence: CITY ORDINANCES: HOW PROVED.** An ordinance of the city of Beatrice may be proved by original records showing that it was regularly passed, though the city charter provides that proof of ordinances may be made by the certificate of the clerk, or by the production of a book or pamphlet purporting to be published by authority of the city.
2. **Municipal Corporations: SALE OF VACATED STREETS.** The statutory power of the city of Beatrice to sell the fee to vacated streets may be exercised by the mayor and council without a vote of the people. Comp. St. 1903, ch. 13, art. III, sec. 48, subd. 4.
3. ———: **POWERS: HOW EXERCISED.** Where a municipal charter confers in direct terms upon a city the power to perform a particular administrative act, without specifying how it shall be exercised, the mayor and council may proceed by resolution.
4. ———: **STREETS: VACATION: DAMAGES.** "Where part of a street is vacated, the general rule is that only those property owners whose property abuts upon the vacated part of the street, and who are thus cut off from access to their property, are entitled to damages on account of such vacation." *Enders v. Friday*, 78 Neb. 510; *Lee v. City of McCook*, 82 Neb. 26.

APPEAL from the district court for Gage county: JOHN B. RAPER, JUDGE. *Affirmed.*

E. O. Kretsinger, for appellants.

Rinaker & Kidd, Hazlett & Jack and R. W. Sabin,
contra.

ROSE, J.

The mayor and council of Beatrice passed an ordinance vacating Twelfth street for the spaces of three city blocks between the intersecting streets from Monroe to Garfield, leaving the intersections open, and, pursuant to a subsequent resolution, deeded the vacated portions to adjacent owners. This is a suit to annul the municipal action so taken and to reopen the street. Plaintiffs own real estate in the city, but none of it abuts on any vacated part of Twelfth street, nor does the closing thereof interfere with ingress to or egress from their premises. It is insisted, however, that the property of plaintiffs is damaged by the change, and that they are required to travel further in going to and in coming from school buildings and other public places. The mayor and the members of the council, the grantees named in the deeds and the city of Beatrice are defendants. The evidence sustains findings that grantees made their purchases in good faith, that they paid full value for the land purchased, that they have since occupied and improved it, and that fraud on part of any city officer is not shown. The trial court dismissed the suit, and plaintiffs have appealed.

Under the city charter the fee to the streets belongs to the city. Comp. St. 1911, ch. 13, art. III, sec. 6. Plaintiffs insist, however, that there is no proof that an ordinance vacating portions of Twelfth street was passed according to law. It is true that the passage of the ordinance was not proved, as provided in the city charter, by the certificate of the city clerk, or by the production of a book or pamphlet purporting to be published by authority of the city. Comp. St. 1911, ch. 13, art. III, sec. 46. These, however, are not the exclusive methods of making such proof. Every step necessary to the enactment of a valid ordinance was properly shown by the original records, and this was sufficient. *Johnson v. Finley*, 54 Neb. 733.

The principal argument made by plaintiffs is directed to the proposition that the mayor and council had no

power to sell the vacated portions of the street, because they had never been authorized to do so by a vote of the people. The question of making the sale was never submitted to the voters, and defendants contend that such a step was unnecessary, while plaintiffs rely on that part of the charter which grants to the city power to sell real estate, but imposes restrictions as follows: "But they shall not have power to sell any real estate of the city unless authorized so to do by a vote of the majority of the electors of such city at a special election therefor; provided, that upon the affirmative vote of three-fourths of all the members of the city council, the same to be entered of record, such city may by ordinance direct the sale and conveyance of any such real estate which the city may have acquired at a sale for delinquent taxes as herein provided, upon such terms as the council may deem best, without first submitting the question of such sale to a vote of the people." Comp. St. 1901, ch. 13, art. III, sec. 8. When this provision was enacted, land reverted to adjacent owners upon the vacating of a street, and did not become property of the city.

Later, in 1903, the city charter was amended to include this new provision: "Upon the vacation of any street, avenue, or alley, or part of either, the same so vacated shall be and remain the property of the city, but may be sold and conveyed by the city for any price that shall be agreed upon by the mayor and three-fourths of the city council." Comp. St. 1903, ch. 13, art. III, sec. 48, subd. 4.

The earlier provision, requiring a vote of the people, did not apply to land retained by the city upon the vacating of a street, because, when enacted, the city could not acquire property in that way. The later act, which retained title in the city, authorized, in the same sentence, the sale of the land "for any price that shall be agreed upon by the mayor and three-fourths of the city council." The sale is thus authorized without a vote of the people. The effect of the new legislation is to allow the city to retain the land, after streets are vacated, and

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to authorize the mayor and council to sell it, in addition to land acquired at delinquent tax sales, without a vote of the people. This is clearly the intention of the legislature. It does not extend the earlier act to new conditions having no application thereto, nor narrow the later act by former limitations at variance with its terms. The new provision is confined to a specific subject, and should not be controlled by general provisions of the former act. If both statutes are considered with reference to the conditions existing when each was enacted, neither interferes with the other, and full effect can be given to all of the legislation. The sale was made in conformity with the later act, and authority to make it did not depend upon a vote of the people.

The transfer of title, the terms of the sale and the making of the deed were authorized by a resolution instead of an ordinance, and this is pointed out as a fatal defect in the proceedings. Power to make the sale is granted, but the method of exercising it is not specified in the grant. Municipal action by ordinance is not required. Under a former decision the resolution must be held effective. *McGavock v. City of Omaha*, 40 Neb. 64.

Finally, plaintiffs contend that the closing of the street and the transfer of the land will damage their property, that this cannot be done without compensation, that the damages have not been ascertained or paid, and that therefore the action of the city is illegal and void. No part of the property of plaintiffs abuts on any vacated portion of the street and there has been no interference with access to their own premises. Though their injury may be greater in degree than that of others, it is one suffered in common with the rest of the community. Whatever may be the rule elsewhere, it has been held here that plaintiffs are not entitled to damages from the city under the facts proved. *Enders v. Friday*, 78 Neb. 510; *Lee v. City of McCook*, 82 Neb. 26.

Plaintiffs have not made a case entitling them to relief, and the dismissal is

AFFIRMED.

**FIRST NATIONAL BANK OF UNIVERSITY PLACE, APPELLEE,
v. E. M. WHEATLEY, APPELLANT.**

FILED JANUARY 16, 1913. No. 16,918.

1. **Banks: LIABILITY TO DEPOSITOR.** A bank is not liable to a depositor for damages resulting from the failure to pay a check in currency upon his demand, where he subsequently accepted a New York draft in lieu of the currency demanded, and never made a subsequent demand upon his banker for currency or offered to return or surrender the draft, but immediately transferred it and used the proceeds for his own benefit, the draft being promptly paid by the bank upon which it was drawn.
2. **Guaranty: LIABILITY OF GUARANTOR.** A guarantor is not liable on his contract, where the person for whose benefit it is made violates his own obligations as a party thereto and deprives the guarantor of the means of preventing the loss protected by the guaranty.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

George W. Berge, for appellant.

Hainer & Smith and Julius Weil, contra.

ROSE, J.

This is an action on a promissory note for \$100, dated October 5, 1907, payable 30 days after date to the First National Bank of University Place, and signed by E. M. Wheatley. The payee is plaintiff and the maker is defendant. The answer contained an admission that defendant signed the note, a general denial, and also a cross-petition, pleading, in substance, that he contracted in writing October 5, 1907, with Mary J. Treadway to purchase her house and lot in Lincoln for \$1,500, agreeing to pay her \$100 in cash and \$1,400 within 30 days; that he borrowed from plaintiff the same day \$100 to make the cash payment, gave the note in suit, stated the purpose for which he procured the loan, and said that, without yet having received any purchase money, he had sold his

own residence with the intention of buying Mrs. Treadway's; that he deposited in plaintiff's bank October 28, 1907, \$1,803.30, procured from plaintiff a certified check for \$1,375, and tendered it with \$25 in payment of the balance of the purchase price and requested a deed; that the check was refused with a demand for cash; that defendant informed the bank of the refusal, requested cash for the check, and stated that, in case he did not receive it, he would lose the \$100 already paid; that plaintiff refused to give him the cash, but suggested payment of the balance of the purchase price by means of a New York draft for \$1,375, and guaranteed that defendant would not lose the cash payment of \$100, in the event of Mrs. Treadway's refusal to accept the draft, and that, in conformity with the arrangement described, the draft was issued by plaintiff and tendered by defendant with \$25 in cash, which were also refused; that, by reason of the facts pleaded, defendant was unable to complete his purchase or to procure a conveyance, and lost his cash payment of \$100. Defendant also pleaded that, having sold and lost possession of his own residence, and having failed to procure the property which he agreed to buy, he sustained additional damages as follows: House rent, \$60; repairs on leased house, \$19; expenses of moving, \$8.85; loss of time, \$15; interest on loan, \$9. The reply was a denial of all facts not admitted in the petition. The trial court directed, and the jury rendered, a verdict in favor of plaintiff for \$125, and from a judgment thereon defendant has appealed.

Was the peremptory instruction erroneous? That is the question presented. The testimony of plaintiff tended to prove the facts pleaded in his petition, and he was generally corroborated by other witnesses or by documentary evidence, but that plaintiff assumed liability for any damage or loss resulting from the failure of Mrs. Treadway to accept the draft in payment of the balance of the purchase price of her lot was emphatically denied by officers of the bank. The following facts are established without

dispute: Defendant borrowed \$100 from plaintiff October 5, 1907. As part of the transaction he executed and delivered the note in controversy. The entire debt is unpaid. Plaintiff's failure to pay defendant's check in currency grew out of the financial panic of 1907. Plaintiff and other banks in the community temporarily suspended payments in currency, except in small amounts, as soon as they opened their doors for business in the morning of October 28, 1907. Later in the day defendant deposited in plaintiff's bank checks and drafts amounting to \$1,803.30. He did not deposit any currency. Before he left the bank he knew that small sums only were then being paid on checks, because he attempted to check out \$25, and was put off with \$5, which he accepted. Without demanding currency, he drew his check the same day for \$1,375 and had it certified by the cashier. The next day he tendered the check and \$25 to Mrs. Treadway. She refused to accept anything but money. He appeared at the bank October 30, 1907, stated that his check had been rejected, and demanded the amount thereof in cash. Plaintiff refused to give it to him, for the reason that payment of currency in large amounts had been temporarily suspended on account of the panic. After some discussion defendant, at the suggestion of an officer of the bank, accepted a draft on New York for the amount of the check, and with it and \$25 made a second tender, which was also rejected by Mrs. Treadway with a demand for cash. Without returning to the bank or notifying it that the draft had not been accepted, defendant went immediately to Lincoln, promptly transferred and indorsed the draft to the First National Bank, procured a bank credit therein for \$850 and received a cashier's check for the balance. After the panic and the resumption of payments in currency, he realized the full amount of his New York draft, which was marked paid through a New York clearing house November 2, 1907. Before November 5, 1907, he had not only withdrawn his deposit from plaintiff's bank, but he had overdrawn his account \$5.90. After

the draft had been rejected by Mrs. Treadway, he never presented it to plaintiff, or offered to surrender it, or demanded currency in any sum. For two or three days he failed to notify plaintiff that Mrs. Treadway had refused to accept the draft. As late as November 15, 1907, ten days after the time to make the final payment had expired, under the terms of the contract of purchase, Mrs. Treadway told defendant that she would wait on him a week or ten days "to see if conditions would not loosen up," and that if he could get the money within a reasonable time "she would close the deal." No attempt is here made to state all the facts. The purpose has been to give enough of the uncontradicted evidence to test the peremptory instruction.

Defendant insists that, when the bank refused to pay his deposits in cash, and when it issued the New York draft, it guaranteed he would not lose his cash payment of \$100 by any refusal on part of Mrs. Treadway to accept its paper in payment of the purchase price of her property; that she did in fact refuse to accept anything but currency, and, by reason thereof, he was unable to complete his purchase and lost the amount already paid; that there is direct proof of all these facts; that the resulting damages pleaded in his answer were proper subjects of set-off or counterclaim in his cross-petition. His deduction is that there was error in the peremptory instruction. The position thus taken is untenable for the following reasons: He deposited with plaintiff checks and drafts during a panic when such paper was not being paid in currency, and, without demanding a return thereof, accepted \$5 in cash after having demanded \$25, and left the bank knowing that small sums only were being paid in cash. The bank never refused to return the amount of his deposit in the same medium of exchange in which it was received. After he demanded currency for his own certified check, it was torn up by an officer of the bank in his presence, without protest, and he accepted a New York draft for the same amount upon the suggestion of the

bank that he tender it to Mrs. Treadway instead of currency. He never afterward made a demand on plaintiff for currency. He never returned the draft, but transferred it for his own benefit the day it was issued, and made it the means of reducing his bank account with plaintiff \$1,375. He waited two or three days before notifying plaintiff that its draft had not been accepted by Mrs. Treadway. He obtained credit in other banks for the full amount of the draft before the time for completing his purchase had expired, and eventually received the proceeds in currency or its equivalent. By withdrawing from plaintiff's bank his only funds for paying his debt, he took away its means for either paying his deposit in cash or for making a legal tender to Mrs. Treadway. On every principle of fair dealing applicable to banking transactions, his acceptance and transference of the draft, under the circumstances narrated, was a waiver of his former demand for currency. The jury, therefore, should not have been permitted to hold plaintiff liable for its failure to comply with defendant's demand for currency.

Should the jury have been permitted to find plaintiff liable to defendant on a guaranty that he would not lose his payment of \$100, if Mrs. Treadway refused to accept the draft for the balance of the purchase price? If defendant intended to hold plaintiff liable on a contract of guaranty, he should have proved that his own obligations and duties in that behalf were fully performed. If plaintiff agreed to protect defendant against a forfeiture, he should not have deprived the bank of its only means of protecting itself from the same loss, nor should he have neglected the performance of any expressed or implied duty on his part. Time was not of the essence of his purchase. This is shown on the face of his contract and by his own testimony. He said Mrs. Treadway told him as late as November 15, 1907, ten days after the time fixed by the contract for closing the transaction, that she would wait on him a week or ten days "to see if conditions would not loosen up," and that if he could get the

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money within a reasonable time she "would close the deal." Suspension of payments in currency lasted about 60 days. The conditions were such as to excuse strict performance, in absence of a contract to the contrary. After the financial flurry passed, defendant received the proceeds of plaintiff's draft in currency, or in checks convertible into cash, and put his money in a safety deposit vault. He never made a legal tender of the balance due on the purchase price, though he testified he once went to the home of Mrs. Treadway in her absence with the purpose of doing so. Before the time for making the last payment expired, he had transferred the draft, had accepted the proceeds thereof, and had overdrawn his account with plaintiff to the extent of \$5.90. After taking and transferring the draft, which had been issued in good faith in the hope that it would be accepted by Mrs. Treadway, he thus deprived plaintiff of the means of either paying his demands in cash or of tendering currency to protect its guaranty, and did not himself make a legal tender, though he could have done so within a reasonable time with the proceeds of the draft issued by plaintiff. On elementary principles of guaranty, defendant cannot hold plaintiff liable for his loss under such circumstances, and the question should not have been submitted to the jury, since there is no evidence to sustain a verdict in his favor on that issue.

In what has been said there is no intention to intimate that a financial panic is an excuse for nonpayment of a bank depositor's check, or that an enforceable contract of guaranty was made, or that defendant's plea for damages was a proper set-off or counterclaim. No opinion is expressed on any of those questions. They are not necessary to a decision, because there is no proof to show liability on the part of plaintiff for failure to pay defendant's demands in currency or for breach of guaranty.

There was no error below in directing a verdict for plaintiff, and the judgment is

AFFIRMED.

FAWCETT, J., concurs in the conclusion.

HAMER, J., dissenting.

I dissent upon the ground that, when the bank received the deposit, it was with the express understanding that it would furnish the money to pay for the house purchased by the defendant. It did not do so, and in consequence the defendant lost the \$100 put up as forfeit money. That the money deposited in the bank was afterwards paid is no justification. The bank should not be excused on account of its failure to keep its contract, even if there was a financial flurry which made money scarce; and, if the depositor sustained a loss as the direct consequence of the bank's failure to furnish the money when it had agreed to do so, the loss should be made good, and a set-off against the note should be allowed. The method of this particular bank in declining to pay out more than a very small amount of the money deposited was adopted by many other banks at the time, and is not deserving of censure from a moral standpoint, because it was this method which averted a panic that would have been very destructive, probably, of all sorts of financial and manufacturing interests, and would have swept away the savings of thousands of persons in all parts of the United States, but the method, as it affected the defendant in this case, was without legal excuse and ought not to be justified by the decision of a court.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, v. J. T.
MCLEAN, TREASURER, APPELLEE.

FILED JANUARY 16, 1913. No. 17,687.

1. **Taxation: LEVY FOR TOWNSHIP PURPOSES.** Under township organization, the electors at the town meeting have power, within statutory limitations, to determine the amount of taxes required for township purposes, and the action taken thereat is the foundation for the county board's levy.

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2. ———: INJUNCTION: BURDEN OF PROOF. In a suit for an injunction to prevent the collection of township taxes levied by duly authorized officers within statutory limitations, the burden of proving facts which show that the taxes are illegal is on plaintiff.
3. Towns: RECORDS: EVIDENCE. It is the duty of the town clerk to keep minutes of township proceedings, and to enter therein at length every order, direction, rule and regulation of the town meeting, and the record thus made is the primary evidence of the business transacted.
4. ———: ———. In counties under township organization, the proceedings of the town meeting and the acts of town officers in relation thereto should be liberally construed with a view to uphold- ing the transaction of essential public business.
5. Taxation: LEVY FOR TOWNSHIP PURPOSES: VALIDITY. In reporting to the county clerk the action of the town meeting on the subject of taxation, the failure of the town clerk to enumerate in his certificate the several purposes for which the taxes are needed, or to state the amount required for each purpose, does not necessarily invalidate the levy, where it is made by the proper officers and is within the limitation fixed by statute.
6. ———: ———: ———. The fact that a town clerk, in certifying to the county clerk the amount of taxes required for township purposes, indicates the necessary number of mills as the basis of a levy, instead of stating the specific sums necessary for different township purposes, does not of itself invalidate the taxes, where they are levied by duly authorized officers and are within statutory limitations.

APPEAL from the district court for Merrick county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Edson Rich and Martin & Bockes, for appellant.

W. H. C. Rice, Elmer E. Ross and Patterson & Patterson, contra.

ROSE, J.

The relief sought is an injunction against the treasurer of Merrick county to prevent him from collecting unpaid taxes levied in 1911 for township purposes on plaintiff's property in four townships. The revenue law authorizes a township at a town meeting to determine the amount of

money needed for township purposes, requires the town board to certify the result to the county clerk, and imposes upon the county board the duty of levying the necessary taxes. For the year 1911 plaintiff paid what would amount to a 2-mill levy on the assessed valuation of its property in each of the four townships, and assails all taxes in excess thereof as illegal. The name of the township, the number of mills, the tax levied, the amount paid and the balance unpaid are: Central: 5 mills; tax levied, \$485.90; amount paid, \$194.36; balance, \$291.54. Chapman: 8 mills; tax levied, \$1,260.76; amount paid, \$315.19; balance, \$945.57. Vieregg: 3 mills; tax levied, \$325.08; amount paid, \$216.72; balance, \$108.36. Prairie Island: 5 mills; tax levied, \$31.70; amount paid, \$19.02; balance, \$12.68. The substance of what was certified by each town clerk to the county clerk as the basis of a levy follows: Central township: There was a 5-mill levy voted at the annual town meeting "for a general fund." Chapman township: Chapman township levied 8 mills "for all purposes" at the regular annual meeting. Vieregg township: Had the annual meeting March 7 and the levying of "tax was 3 mills." Prairie Island township: The following tax was levied "for general fund:" 5 mills. There is no dispute about the facts. Certificates of the town clerks, records of the county board, and other proofs showing the facts summarized were introduced in evidence and are not controverted. Plaintiff, as indicated by its pleadings and argument, took the position that the certificates of the town clerk were jurisdictional, that they should have enumerated the several township funds to be raised by taxation and stated the amount required for each, and that therefore they were insufficient to authorize the levies made. As to the township taxes, an injunction was denied, and plaintiff has appealed.

One of the points argued is stated thus: "The purpose for which the tax is levied has not been fixed and determined by the township at its annual meeting as required by law." The only proofs offered to establish

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this assertion are the certificates of the town clerks, and it is insisted that they are conclusive. Are they? The question presented requires consideration of the powers and duties of a township, of its clerk, and of the county board, in relation to taxation. The electors present at the annual town meeting have power: "To direct the raising of money by taxation for the following purposes: 1st. For constructing and repairing roads and bridges within the town to the extent allowed by law. 2d. For the prosecution or defense of suits by or against the town or in which it is interested. 3d. For any other purpose required by law. 4th. For the purpose of building or repairing bridges over streams dividing said town from any other town. 5th. For the support of the poor within the town; provided, that when the county board of any county shall have established a poorhouse under any statute law of this state, the support of the poor shall be provided for by the county board, and no taxes for that purpose shall be voted by the electors at town meetings except sufficient to provide temporary relief. 6th. For the compensation of town officers at the rate allowed by law, and when no rate is fixed for such amount as the electors may direct." Comp. St. 1911, ch. 18, art. IV, sec. 22. Another section of the statute provides: "The moneys necessary to defray the town charges of each town shall be levied on the taxable property in such town, in the manner prescribed by law for raising revenue. The rate of taxes for town purposes shall not exceed, for roads, ten mills on each dollar of the valuation; for bridges, two mills on each dollar of the valuation; for all other purposes, two mills on each dollar of the valuation. The electors at the annual town meeting shall determine the amount of money necessary to be levied for each fund for town purposes, and the town board shall certify to the county clerk, the amount of moneys voted to be raised at the annual town meeting for each of said funds, and said amounts shall be levied by the county board on taxable property in such townships and collected as other taxes

provided, however, that said amount shall not exceed fourteen mills on the dollar valuation as assessed and equalized." Comp. St. 1911, ch. 18, art. IV, sec. 58. The town clerk is made the custodian of all records, books and papers of the town. Comp. St. 1911, ch. 18, art. IV, sec. 47. His duties are further defined by the following sections: "The town clerk last before elected or appointed shall be the clerk of the town meeting, and shall keep faithfully minutes of its proceedings, in which he shall enter at length every order or direction and all rules and regulations made by such meeting, and the same shall be signed by himself and the moderator." Comp. St. 1911, ch. 18, art. IV, sec. 32. "The minutes of the proceedings of every town meeting, subscribed by the moderator and clerk of such meeting, shall be filed in the office of the town clerk within ten days after such town meeting." Comp. St. 1911, ch. 18, art. IV, sec. 39.

Authority to certify to the county clerk "the amount of money necessary to be levied for each fund for town purposes" is found in the following statutory provisions: "The proper authorities of cities, villages, townships, and districts authorized by law to vote bonds or assess taxes, except such cities as are authorized by law to levy and collect their own taxes for municipal and school purposes, shall annually, on or before the first Monday in June, certify to the county clerk the several amounts which they severally require to be raised by taxation, including all amounts due upon legal and valid bonds outstanding against such corporation; provided, that school district taxes shall be certified to the county clerk on or before the first Monday in July." Comp. St. 1911, ch. 77, art. I, sec. 138. The power of the county board to make the necessary levy for township purposes is granted by the revenue law in the following language: "On the last day of sitting as a board of equalization the county board shall levy the necessary taxes for the current year, including all county, township, city, school district, precinct, village, road district, and other taxes required by law to be

certified to the county clerk and levied by the county board." Comp. St. 1911, ch. 77, art. 1, sec. 136.

The statutes make it plain that the sovereign power to determine what proportion of the property in a township shall be taken from the owners in the form of taxes for township purposes has been committed by the legislature to the electors at the town meeting. What the town clerk is authorized to do is to make and keep a proper record of the proceedings and to properly certify to the county clerk the result in regard to taxation. The action of the town meeting, and not the certificate of the town clerk, is the foundation of the levy. Any error, irregularity or informality in the certificate should not deprive the township of revenue essential to township government, if the county board in fact levied taxes in conformity with legal proceedings of the town meeting. If its record is considered to be the evidence of what was done, instead of the clerk's certificate, plaintiff adduced no proof to show that the electors did not determine the specific sums required for each purpose for which taxes are leviable. The statute declares that a 14-mill levy is the limit of taxation for township purposes and the record shows that an estimate of 8 mills was the highest rate fixed in any of the townships named. If the township and the taxing officers exercised their powers lawfully, the levies are valid. In absence of proof to the contrary the validity of the taxes will be presumed. Plaintiff has the burden of proving they are illegal. On this subject the supreme court of Illinois ruled: "One objecting to the enforcement of a tax has the burden of showing its invalidity, since the presumption is that the tax is just and that all officers who have had any official connection with it have properly discharged their duties." *People v. Keener*, 194 Ill. 16.

With the exception of the certificate of the town clerk, plaintiff offered no proof to show the proceedings of the town meeting. Had the town clerk certified, and the county board levied, a tax in excess of the amount de-

terminated by the town meeting, plaintiff, to prevent enforcement of the illegal tax, could have shown by the record of the town meeting that the clerk's certificate was false. This doctrine was announced by the supreme court of Illinois in the following language: "The record of a town meeting is competent to contradict the certificate of a town clerk to the levy of a tax, where the first step in the levy can be taken only at a town meeting, and a record of every order or direction made by such meeting must be kept." *Baltimore & O. S. W. R. Co. v. People*, 156 Ill. 189.

In the early history of this court the same principle was stated in this form: "By section forty-four of the school law, the director is required to keep a record of all the 'proceedings of the district in a book to be kept for that purpose,' and it is to this, and this alone, that resort must be had to ascertain what the district has done, what taxes have been voted, and for what particular purposes they were levied." *Burlington & M. R. R. Co. v. Lancaster County*, 4 Neb. 293.

Plaintiff has proved nothing to show that the taxes, if collected, will not be lawfully expended pursuant to the directions of the town meeting for the specific purposes enumerated in the statutes. The levies being within the statutory limit, the presumption being that they are valid, the foundation of the taxes being the proceedings of the town meeting and the statute requiring a public record thereof, the burden was on plaintiff to show that the levies did not conform to the action of the town meeting, and, for the purpose of proving that fact, informal and irregular certificates of the town clerk are insufficient. For plaintiff's failure to maintain the burden of proof, the injunction was properly denied.

A decision based on the sufficiency of the certificates of the town clerks must also be adverse to plaintiff. The statutes have conferred on the people of a township the power to impose upon themselves taxes for local purposes. It is understood that such power will often be exercised

by persons who are not familiar with the technicalities of the law and who do not express themselves in accurate language. The proceedings of the town meeting and the acts of town officers should therefore be liberally construed with a view to upholding the transaction of essential public business. In discussing this subject, Judge Cooley in his work on Taxation said: "In voting the tax the people will be acting in their political capacity, and their action is to be favorably construed, and not to be overruled or set aside by judicial or any other authority, so long as they keep within the limits of the power bestowed upon them. Technical defects and irregularities should be overlooked, so long as the substance of a good vote sufficiently appears, for the obvious reason that local business is largely and of necessity in the hands of plain people who are unskilled in the technicalities of law and unaccustomed to critical or even accurate use of language." 1 Cooley, Taxation (3d ed.) p. 573.

The certificates were obviously intended to indicate the number of mills leviable for all township purposes, and the county board apparently so understood them. An interpretation in harmony with the views of Judge Cooley leads to a holding that the failure of the town clerk to enumerate the several purposes for which the taxes were needed and to state the amount required in each fund did not invalidate the levy, since the limitation prescribed by law was not exceeded. *Weston Lumber Co. v. Township of Munising*, 123 Mich. 138. Referring to the report of taxes voted by a school district, it was said in *Burlington & M. R. R. Co. v. Lancaster County*, 4 Neb. 293: "We do not think it was intended, nor would it be reasonable to require that an itemized statement be given of the purposes for which the funds were intended. It certainly could be of no practical use whatever, and the omission to do so could work no possible injury to any one."

The fact that the town clerk reported the necessary number of mills as the basis of a levy, instead of stating the gross sum required for each purpose, did not invali-

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date the taxes. This question was once considered by Judge Brewer, who said: "Another objection is, that it appears from the certificates sent by the county clerk of the one county to the county clerk of the other, that the county commissioners in making the levy simply fixed the rate per cent., instead of determining the amount to be raised for these several indebtednesses. We cannot think this a substantial defect; having the assessed value of the property before them, it can make no substantial difference whether the resolution of the commissioners declared that so much money in gross must be raised, or that a certain rate per cent. be levied for such tax; the result is the same, and a mere difference in the form of the expression ought not to weigh against the substantial rights of either party." *Commissioners of Marion County v. Commissioners of Harvey County*, 26 Kan. 181, 202.

For the reasons given, an injunction to prevent the collection of township taxes was properly denied.

AFFIRMED.

HAMER, J., dissents.

FAWCETT, J., dissenting.

To my mind there was scarcely a semblance of compliance with the law by either the voters or the clerk.

MARY A. TRAINOR ET AL., APPELLANTS, V. MAVERICK LOAN & TRUST COMPANY ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,826.

1. Judgment: RES JUDICATA. "A cause of action, once finally determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal." *Yates v. Jones Nat. Bank*, 74 Neb. 734.

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2. ———: ———. "The foregoing rule applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of the case; but a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of *res judicata*." *Yates v. Jones Nat. Bank*, 74 Neb. 734.

APPEAL from the district court for Box Butte county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed*.

L. A. Berry and Wright & Duffie, for appellants.

Albert W. Crites, C. Patterson and William Mitchell,
contra.

FAWCETT, J.

In 1906 the plaintiffs in the present suit brought suit in the district court for Box Butte county against the present defendant, the Maverick Loan & Trust Company, to recover the same land in controversy here. They were defeated in the district court, and upon appeal to this court the judgment below was, on February 6, 1908, affirmed. *Trainor v. Maverick Loan & Trust Co.*, 80 Neb. 626. The mandate of this court, dated March 20, 1908, was filed in the district court for Box Butte county March 21, 1908. On November 25, 1908, the Maverick Loan & Trust Company conveyed the land to the defendant Alfred R. Wilson, who immediately recorded his deed and went into possession of the premises. On June 5, 1909, the plaintiffs commenced the present suit, making the Maverick Loan & Trust Company and Alfred R. Wilson defendants. Defendants each answered separately and, among other things, pleaded the final disposition of the former case as *res judicata*. If this plea is good, then, as stated by counsel for plaintiff in his brief: "There is no occasion for delving deeper into the matter." We think the plea must be sustained.

For a statement of the ground upon which plaintiffs

are seeking to recover the land, we refer to our former opinion. The petition in the former suit alleges the death of William H. Trainor; that plaintiffs are his heirs; that at the time of his death he was the owner of the land in controversy; that plaintiffs had never sold their interest in the land and were at the time of the commencement of the suit owners of the same; the purchase by defendant Maverick Loan & Trust Company of the lands at tax sale; the amount paid for the same; the amount of subsequent taxes paid; the publication in 1905 of the notice to redeem and attached copy of the notice to the petition; the surrender of the county treasurer's certificate of tax sale, which is made a part of the petition, and the demand on the treasurer for a tax deed; that the treasurer executed and delivered to said defendant a tax deed, which is attached to their petition; that defendant claimed to be the owner of the land by reason of such deed; that the sections of the statute under which the sale was made and deed issued were unconstitutional; that an attempt was being made to deprive plaintiffs of their title and vested right in the land without due process of law; that, although the deed issued by the treasurer "was a deed in form, it was in truth and fact a mortgage, if anything, securing the amount of taxes, interest and costs paid by the defendant, Maverick Loan & Trust Co., under and by virtue of said county treasurer's certificate of tax sale;" that the county treasurer did not own the land, had no right, title or interest in the same, and could not by the deed referred to convey or give to the defendant any right or interest in the same; that the attempt of the county treasurer so to do was without authority, unconstitutional and contrary to section 3, art. I of the constitution; that the amount due the Maverick Loan & Trust Company for delinquent and subsequent taxes, interest and costs was the sum of \$14.60, "which said sum is probably secured by said deed on said described land which was issued in lieu of said county treasurer's certificate of tax sale;" that they tendered the said sum of \$14.60 to the defend-

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ant Maverick Loan & Trust Company, and demanded that said defendant reconvey the said premises to plaintiffs or to the county treasurer of Box Butte county, and surrender said deed to the county treasurer for cancellation; that they also tendered the said sum of \$14.60 to the county treasurer for the use and benefit of the defendant, and demanded that the treasurer recall said deed and cancel the same and issue to them a redemption certificate; that they were ready to pay defendant whatever might be justly due it for taxes, interest and costs, and brought into court the sum of \$14.60 and deposited the same with the clerk. The prayer of the petition was: That an account be taken of the amount due defendant, and that upon payment of the amount defendant be required to reconvey the premises to plaintiff; that possession of the premises be delivered to plaintiff; that if defendant refused to reconvey the court enter a decree to take the place of such deed; that the court find the deed to be only a mortgage, and that defendant has no right, title or interest in the land except as a mortgagee; that the deed be set aside and be declared null and void, and the cloud cast upon plaintiffs' title by said deed be removed, and that the law under which the deed was issued be found to be unconstitutional; "that the title to said premises may be quieted and confirmed in plaintiffs, and that plaintiffs may be allowed to redeem said premises from said alleged deed, and for such other and further relief as may be just and equitable." To that petition the defendant filed a general demurrer which was sustained, and, plaintiffs refusing to plead further, but electing to stand upon their petition, the suit was dismissed at their costs. The judgment was, as before stated, affirmed by this court.

After the mandate went down, nothing further was done by plaintiffs until June 5, 1909, which was more than six months after the Maverick Loan & Trust Company, evidently deeming the litigation at an end, had conveyed the land to the defendant Wilson, when plaintiffs filed the petition in this suit. In the present petition,

after setting out the preliminaries, as in the former suit, it is alleged in paragraph 4 that the treasurer's deed to defendant Maverick Loan & Trust Company is void because: The taxes were not duly and legally assessed; the sale was not duly and legally advertised; that there is no proof of publication on file in the office of the treasurer, nor proof of any delinquent taxes purporting to cover the taxes included in the deed, or that the real estate was subject to sale or would be sold for taxes; that no notice or proof was placed on file in the office of the treasurer showing the amount of taxes against the real estate for the years covered by the deed; that no notice was served upon plaintiffs by publication or otherwise that a tax deed was about to issue; that no notice was served upon the occupant of the land that taxes were delinquent or that the defendant Maverick Loan & Trust Company would apply for a tax deed or that a deed was about to issue; that no proof of service of the application of the Maverick Loan & Trust Company for a tax deed or that a tax deed was about to issue was placed on file in the treasurer's office; that prior to issuance of the deed no proof was on file with the treasurer that any service had been made on the occupant of the land of the application for a deed, or that a deed was about to issue; that the treasurer had no evidence on record in his office upon which to base the issuance of the deed; that the deed was prematurely issued—in less than two years from the date of tax sale certificate and less than two years from date of sale. By paragraph 5 they again allege that they tendered the Maverick Loan & Trust Company \$14.60, and on June 5, 1909, tendered to defendant Wilson \$22.50, the same being the total amount of all sums expended by Maverick Loan & Trust Company for taxes on the land, together with lawful interest thereon. By paragraph 6 they alleged that prior to March 1, 1906, plaintiffs were in the open and notorious possession of the land; by paragraph 7, that defendants are attempting to permanently exclude plaintiffs from ownership and possession;

that demand has been made on defendant Wilson, now in possession, that he turn the same over to plaintiffs; by paragraph 8, that plaintiffs have no adequate remedy at law. The prayer demands that the deed from the treasurer to defendant Maverick Loan & Trust Company be canceled; that the deed from said defendant to the defendant Wilson be canceled; that the mortgage from defendant Wilson to defendant Maverick Loan & Trust Company for a part of the purchase money be canceled; that plaintiffs be adjudged sole owners; that defendants have no title; that plaintiffs be awarded possession and defendants be enjoined from interfering with plaintiffs' right of possession, and for general relief.

The above statement of the two petitions filed, and of the relief demanded in each, would seem to render discussion unnecessary. It is urged that the decision of the former case in this court decided but two points, viz.: "(1) An act for levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. (2) Due process of law does not necessarily require a judicial hearing in matters of taxation." And hence the plaintiffs are not now precluded thereby from proceeding in another suit to establish their right to the possession of the land upon other and different grounds than those settled by the decision in this court in the former case. In this contention we are unable to concur. The decision of this court was that the judgment of the district court be affirmed; and the mandate commanded the district court without delay to carry into effect its judgment. The judgment in the district court adjudicated adversely to plaintiffs their right to relief upon any grounds demanded in the prayer of their petition as above set out. They were thereby denied relief upon their specific demands; that an account be taken, and upon payment of the amount expended by defendant that it be required to reconvey the land to plaintiffs; that the possession of the premises be delivered to plaintiffs; that if defendants refused to convey the

court enter a decree in lieu thereof; that the court find the deed to be only a mortgage; that the deed be set aside and be declared null and void and the cloud cast upon plaintiffs' title by said deed be removed; that the law under which the deed was issued be found to be unconstitutional; that the title to the premises be quieted and confirmed in plaintiffs, and that they be allowed to redeem the land from "said alleged deed."

The petition in the former suit asked that the tax deed be set aside for several reasons: That the deed was only a mortgage; that defendant had no right or interest in the land except as mortgagee; that the deed be set aside and declared void and the cloud cast upon plaintiffs' title thereby be removed; that the law under which the deed was issued be found to be unconstitutional; that the title be quieted and plaintiffs allowed to redeem. It will be seen that the cause of action was in equity to redeem on account of the invalidity of the tax deed, and the allegation that the deed was void is the peg on which the whole case hung. The court found on the facts stated in the petition that the deed was valid and rendered judgment of dismissal. The demurrer was not sustained because the suit was prematurely brought, or for any defect apparent upon the face of the petition. The demurrer went to the merits of the facts presented and upon which the whole cause of action, viz., the right to have the deed set aside, was based. The judgment upon the demurrer was a finding and judgment that upon the facts recited the alleged cause of action was to fail, for the reason that the tax deed was valid. This being so, the subject matter of the suit was adjudicated between the parties, and they have no right to litigate it again. In 2 Van Fleet, Former Adjudication, sec. 304, it is said: "A judgment rendered for the plaintiff for want of an answer, upon overruling a demurrer to his complaint for want of merits, will make the matter *res judicata*; and the same is true in respect to a final judgment for the defendant upon overruling a demurrer to an answer or plea in bar"—citing on the first

point *Johnson v. Pate*, 90 N. Car. 334; and upon the second point, *Wilson v. Ray*, 24 Ind. 156; *Coffin v. Knott*, 2 G. Greene (Ia.) 582, 52 Am. Dec. 537; *Grand Trunk R. Co. v. McMillan*, 16 Canada S. C. 543.

In presenting their first petition plaintiffs said, in effect: "Here is my cause of action, and it is upon these allegations, and these alone, that I claim the right to recover" By its demurrer to that petition defendant said, in effect: "Deeming all these allegations to be true, they do not entitle the plaintiffs to recover." The court, assuming, for the purposes of the demurrer, that the allegations of the petition were true, held that they did not entitle plaintiffs to recover, or, in other words, did not show a cause of action. The truth of the allegations being thus admitted, the case stood upon its merits, the same as if, on a trial, each allegation had been proved, and the ruling on the demurrer was an adjudication on the merits of the case. Plaintiffs might then have amended their petition, and presented additional allegations setting out the facts which they now plead in their second petition, all of which facts were then in existence and a matter of public record. This they declined to do, but stood upon their petition. The judgment entered was, on appeal to this court, duly affirmed. We see no escape from the conclusion that the judgment entered upon the former hearing was a final adjudication upon the merits of plaintiff's claim, to wit, his right to have the deed canceled and that he be permitted to redeem. To this effect is *Gregory v. Woodworth*, 107 Ia. 151, from which opinion much of the language above used is quoted. The fact that the Iowa code differs slightly from ours is not material. Under the reasoning of the Iowa court, the decision would have been the same, regardless of the wording of the code. See, also, *Yates v. Jones Nat. Bank*, 74 Neb. 734, and cases cited on page 743. We recognize the exception to the rule that a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, or the like, which do not involve the merits

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of the controversy, will not support the plea of *res judicata*. But that is not the case here. As stated, the demurrer on the first trial between these parties was not sustained because the suit was prematurely brought, nor for any defect apparent upon the face of the petition. If in that suit they did not see fit to allege specifically the various other grounds, then shown by the official records of the county, upon which they now claim the deed was void and should be canceled, that was clearly their own neglect. They could not split their cause of action and litigate the matter set out in their first petition to final judgment and again vex their former adversary with another suit based on the same wrong, viz., the withholding from plaintiffs of the title and possession of the lands in controversy under a deed which in both suits they alleged was a nullity.

AFFIRMED.

HIRAM P. WALKER, APPELLANT, v. DAVID W. HALE ET AL.,
APPELLEES.

FILED JANUARY 16, 1913. No. 16,902.

1. **Witnesses: COMPETENCY: PRINCIPAL AND AGENT.** The fact that an agent of a party to an action is deceased at the time of the trial does not render the other party an incompetent witness by whom to prove a transaction with such agent during his lifetime and while engaged in the business of his principal.
2. **Payment: AUTHORITY OF AGENT.** "Where one has placed his agent for the investment of money in notes and mortgages in such a situation that persons of ordinary prudence, acquainted with business usages, would be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal." *Harrison Nat. Bank v. Austin*, 65 Neb. 632.
3. **Principal and Agent: AUTHORITY OF AGENT.** Whether or not an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances of the transaction and the business.

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4. Evidence examined and set out in the opinion, *held*, amply sufficient to sustain the findings and judgment of the district court.

APPEAL from the district court for Clay county:
LESLIE G. HURD, JUDGE. *Affirmed.*

Ambrose C. Epperson, for appellant.

S. W. Christy and *L. E. Cottle*, *contra*.

FAWCETT, J.

Plaintiff brought suit in the district court for Clay county, to foreclose a mortgage upon lots 8 and 9, in block 12, in the original town of Ong, in said county. From a decree finding that the note, which the mortgage was given to secure, had been paid and dismissing plaintiff's suit, plaintiff appeals.

The petition is in the usual form. It alleges the execution of the note and mortgage by defendants David W. Hale and wife; the subsequent sale of the premises by the Hales to one McCrain, who conveyed to one Nearhood, who conveyed to one Arthur B. Smock; that the Exchange Bank of Ong is the record holder of a mortgage given to it by defendant Smock. Smock and his wife and the bank were made defendants. The bank answered separately, setting up its mortgage from Smock, and prayed that, in case a decree of foreclosure is entered in favor of plaintiff, its mortgage should be taken into account. The defendants Smock answered, alleging ownership of the premises by defendant Arthur B. Smock; that he purchased the same subject to two mortgages from his grantor Nearhood to the defendant bank. Further answering, it is alleged that, at the time the note and mortgage set out in plaintiff's petition were given by the defendants Hale, J. O. Walker of Ong represented the plaintiff in the taking of said note and mortgage, and thereafter continued to represent plaintiff in the collection of the interest, and was authorized by plaintiff to

collect and receive the principal of said note; that on or about the first day of June, 1905, defendant David W. Hale paid to J. O. Walker \$300 upon the principal of the note; that after the payment of the \$300 defendants Hale sold the land to John M. McCrain, subject to \$300 remaining unpaid of the principal; that on or about the 6th day of February, 1907, McCrain paid the plaintiff the \$300 and interest to the date of said payment, being the balance of the debt represented by the note, "said payment being made at the town of Ong, Clay county, Nebraska, to J. O. Walker, the representative of the plaintiff and the person who made said loan and who had collected all the interest thereon up to said date;" that defendants purchased the premises January 1, 1908, went into possession thereof, have occupied the same to the time of filing the answer, and that they have never had any notice of the alleged claim of plaintiff until the bringing of this suit; "neither have they paid anything on the principal or interest of said alleged claim;" that the said J. O. Walker, to whom Hale and McCrain paid the debt, was representing the plaintiff at Ong, Nebraska, in the loaning of money, in the collection of the principal and interest on said loans and remitting same to the plaintiff, and that in the taking of the notes sued on and the mortgage given to secure the same, and in the collection of the principal and interest, the said J. O. Walker was the agent and representative of the plaintiff and had authority to receive the money so paid to him thereon in payment, satisfaction, and discharge of the indebtedness represented by said note; denied all other allegations in the petition; and prayed for a decree that the indebtedness represented by the note and mortgage had been fully paid by the payment to J. O. Walker, who was authorized by plaintiff to collect and receive the same in discharge of said debt, and that the premises described in plaintiff's petition be released and discharged from any lien under and by virtue of plaintiff's mortgage; that the mortgage be canceled of record, and for general relief. The reply

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to the answer of defendant Smock is a general denial. Defendants Hale answered that the making of said loan and all other transactions in connection therewith were had and done with J. O. Walker, who acted for and represented plaintiff in connection therewith; that all interest payments made by the defendants for the years 1901 to 1905, inclusive, were made to J. O. Walker; allege the payment of \$300 of the principal, as alleged in the answer of defendant Smock, and the sale of the premises to McCrain subject to the remaining \$300, which McCrain assumed and agreed to pay. The trial court found that, at the times and dates alleged in plaintiff's petition and the answer of Arthur B. Smock and Carrie Smock, J. O. Walker was the agent of the plaintiff at Ong, Nebraska, and as such agent was authorized to make loans, collect principal and interest thereon, cancel the notes and enter satisfaction of mortgages; "that the note and mortgage and the principal debt and the interest thereon were paid to J. O. Walker as alleged in the answer of Arthur B. and Carrie Smock, and is a complete satisfaction and discharge of said debt, and said defendants are entitled to have the mortgage canceled of record," and entered a decree in accordance with such findings.

J. O. Walker was plaintiff's nephew, and cashier of the Exchange Bank of Ong, of which his father, plaintiff's brother, was president. It appears from the evidence that J. O. Walker was the active manager of the bank and had the unlimited confidence of everybody in Ong and surrounding country. He died on or about December 17, 1908, and it was then discovered that through his skillfully manipulated and systematic dishonesty a large number of persons, among them some of his most trusting relatives and friends, were defrauded out of large sums of money, aggregating many thousands of dollars. One of his victims, whom he had deceived for many years, and who must now suffer the loss of a large sum of money by reason of the confidence which he placed in his nephew, is the plaintiff in this case. J. O. Walker seems to have

been no respector of persons. His uncle, with his thousands, and the poor man borrowing a few hundred dollars, alike became his victims.

The first point urged by plaintiff for a reversal is that, "if J. O. Walker was the agent and representative of the plaintiff and he in fact received and failed to remit to the plaintiff the moneys alleged to have been paid him, then upon his death the plaintiff would become his legal representative," and that the testimony of Hale and McCrain as to conversations and transactions with J. O. Walker, who is deceased, is barred under section 329 of the code, which provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation." No time need be spent upon this contention for three reasons: (1) The plaintiff is not the representative of the deceased. The deceased in his lifetime was the representative of plaintiff. (2) Plaintiff himself testified to his correspondence and dealings with J. O. Walker in reference to business generally and the note and mortgage in suit in particular. (3) The point is decided adversely to plaintiff's contention in *German Ins. Co. v. Frederick*, 57 Neb. 538, where we said: "Objection is made to the introduction of evidence as to the transactions of the insured with the agent, on the ground that the agent was dead at the time of trial. This fact seems to have been assumed, but it was not proved. However, the statute makes such testimony incompetent only where the adverse party is the representative of the deceased. Here that was not the case. The deceased in his lifetime had been the representative

of the adverse party. Perhaps such cases ought to be brought within the statute, but they are not now within it."

That payment of the full amount of the debt represented by the note and mortgage in suit was made to J. O. Walker is not disputed. The only question therefore to be determined in this case is, was J. O. Walker, at the time the payments were made to him, the general agent of the plaintiff, at Ong, for the purpose of receiving such payments, and were Hale and McCrain justified, at the time they made the payments to him, in believing that he was such general agent?

It is argued that this mortgage was given directly to plaintiff; that it was negotiated through J. O. Walker; that for a number of years, and during the times in controversy, J. O. Walker was cashier of the Exchange Bank, and that the fact, if it is established, that J. O. Walker acted for plaintiff in placing the loan and in the collection of the interest would be insufficient proof of his agency to collect the principal. It is contended generally that the relation of principal and agent between plaintiff and J. O. Walker did not exist; that they were doing business at arm's length; that they were engaged in the purchase and selling of securities, and at the same time J. O. Walker, as cashier of the bank, was interested in furnishing money to the customers of the bank, and that he was availing himself and his customers of the plaintiff's funds for these purposes; that plaintiff testified that he and J. O. Walker did not always pull together; that plaintiff returned papers sometimes that did not suit him; that J. O. Walker did not have entire control of the papers; that plaintiff did not permit him to do as he pleased; that authority was given with reference to each particular matter as it arose and no general authority was given; that "plaintiff did not know that J. O. Walker was conducting matters in a criminal way until after the transactions important to this case had occurred." The evidence shows that plaintiff made over 100 loans through

J. O. Walker. Sixty-five of the loans were taken in the name of plaintiff direct, while 39 were, as shown by plaintiff's statement from his books, taken in the name of J. O. Walker "for the use of plaintiff;" that, with reference to the latter class of loans, J. O. Walker would write to plaintiff telling him of the loans and the security, and asking if plaintiff desired it; that if approved, and only when approved, would plaintiff make the investment. It is also urged that plaintiff was not dealing with J. O. Walker individually, but in his official capacity as cashier of the bank, and that the bank was the agent through which plaintiff was making his Nebraska loans. We are a little at a loss to see how that fact, if it were a fact, could militate in favor of plaintiff, for, if the bank was his agent and J. O. Walker, who was the cashier and managing officer of the bank, did the things complained of, in his capacity as cashier, still the defendants would have the same right to rely upon him in that capacity as they would if he were acting individually. However that may be, the overwhelming weight of the evidence clearly shows that plaintiff was not transacting his business with the bank, nor with J. O. Walker as cashier. A large number of letters written by plaintiff to J. O. Walker were introduced in evidence, and it was stipulated and agreed that plaintiff wrote him at least a total of 200 letters of like tenor during the years that plaintiff was transacting business through him. Without a single exception, those letters were addressed to J. O. Walker as "Dear Nephew." In not a single instance, in reference to the large number of loans that were made, is it shown that plaintiff dealt with the bank. All of these transactions were with J. O. Walker. The deposition of plaintiff was taken, in which he testified: "Q. Mr. Walker, you say that other officers of the bank knew of your transactions with J. O. Walker, in regard to these loans? A. Yes, sir; his father, my brother, knew it. Q. Isn't it a fact that your brother wrote you and requested you not to be dealing with J. O. in reference to the bank business? A.

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He wrote to me, but he didn't tell me not to buy any more of their papers; their notes. * * * Q. Isn't it a fact, too, that you wrote to J. O. about his father telling you that he didn't want you and J. O. to deal any more in the bank papers; you wrote to J. O. about that? A. I did. Q. Did you ever get a letter from him about it? A. I think he answered it. Q. You haven't that letter with you, have you. A. No. Q. You don't know where it is? A. No, I think he answered me. Q. Do you know what he said; what J. O. said? A. I don't know what he said; I suppose he wasn't pleased with his father that he had given me such instructions." Notwithstanding this correspondence, plaintiff continued to transact his business with J. O. Walker precisely as before. Upon the point that, even if J. O. Walker was the agent of plaintiff for the making of loans and collecting interest, he was not thereby empowered to collect the principal of any loans, plaintiff himself testified: "Q. From the time you commenced to loan out in Nebraska till up to the 1st of October, 1908, did you ever receive any remittance of principal or any part of the principal from any borrower direct? A. No, sir. Q. Then, all the interest and principal, whether the latter was paid in full or in part, was collected and transmitted to you by J. O. Walker? A. Yes, sir." The business relations between plaintiff and J. O. Walker covered a period of about 15 years. During that time plaintiff had loaned through him more than \$100,000, and received through him more than 100 notes and mortgages. During all of those years plaintiff never collected a dollar of either principal or interest from any borrower, nor did he ever notify any borrower of the maturity of any note or interest payment, but transacted all of that business through J. O. Walker.

The testimony of plaintiff himself shows that he kept a considerable sum of money on deposit in the bank, of which J. O. Walker was cashier, which money was kept there for the purpose of making Nebraska loans. As money would be paid in, which J. O. Walker reported to

him, it was frequently retained by J. O. until it was re-loaned. "Q. You don't know whether he kept any open account in your name or in J. O.'s name? A. I couldn't tell that. Q. You didn't stop to inquire whether he kept it in his own name or in your name? A. I don't know, no. * * * Q. As a matter of fact, a great many of his mortgages you thought you were entitled to you never got? A. Yes, sir. Q. In fact, you corresponded with him about that, did you not? A. Yes, sir. Q. And rebuked him for it, did you not? A. Yes, sir; I insisted on having the papers. Q. You didn't get them? A. No, sir. Q. When was the first time he neglected to send you the mortgage you thought you were entitled to? A. I couldn't answer that. Q. As early as 1901? A. It might have been about that time. Q. J. O. was neglectful about a number of those things? A. Yes, sir. Q. In fact, he insisted doing as he pleased in those things, did he not? A. It appears he done business in that kind of a way; he had his own time and way. Q. He was doing that since 1901? A. Along that time, I suppose." His testimony also shows a number of cases, both as to loans made to him direct and as to loans made to J. O. Walker for his use, where neither the mortgages nor assignments were forwarded to him by J. O. It shows at least one instance where J. O. accepted payment of a loan before its maturity. Plaintiff complained to him about this, stating in effect that he would have preferred to carry the loan, but nevertheless he let it go. Not a single instance is shown by him where he ever found fault with or criticised J. O. Walker for collecting a loan which was due. This fact, together with the fact that no payment of principal was ever made to him except through J. O. Walker, conclusively establishes the contention of defendants that J. O. Walker was his agent for all purposes relating to his loan business in Nebraska. It seems to us further discussion is unnecessary. From the large number of loans made in the four counties tributary to Ong, all made through J. O. Walker, everybody in that part of the state, in any

manner interested in any of those transactions, was perfectly justified in believing that J. O. Walker was the general agent and business manager of the plaintiff in the business of loaning money upon real estate, and in some instances upon collateral security. Such being the situation and the relation of the parties, the district court was right in finding that the payments made by Hale and McCrain to J. O. Walker were payments to plaintiff.

The law applicable to a state of facts as above outlined is well settled in this jurisdiction: *First Nat. Bank v. Ridpath*, 47 Neb. 96; *Thomson v. Shelton*, 49 Neb. 644; *Holt v. Schneider*, 57 Neb. 523; *Harrison Nat. Bank v. Austin*, 65 Neb. 632; and *Pine v. Mangus*, 76 Neb. 83, 85, where we said: "The appellee claims that the loan company had no authority to extend the time for the payment of \$500 of the principal, nor to collect any part of the principal or interest at any time; and in his deposition states that no such authority existed. But we take into consideration the facts testified to by him, and other evidence showing the relationship which existed between him and the loan company, rather than his opinions or conclusions as to their relations." What we said there we repeat here. The facts testified to by plaintiff and the character of the relations existing between himself and J. O. Walker, as shown by an abundance of evidence, completely outweigh the statement made by plaintiff that no authority existed or had been given to J. O. Walker to collect the principal of any of his loans.

The situation of the plaintiff, who is undoubtedly an honorable business man, is unfortunate; but if the law were otherwise than herein declared the situation of the defendants, and others similarly situated in and about Ong, would be deplorable.

The judgment of the district court is not only right, under the law, but it is just.

AFFIRMED.

HIRAM P. WALKER, APPELLANT, v. F. OSCAR RUDD ET AL.,
APPELLEES.

FILED JANUARY 16, 1913. No. 16,903.

1. **Principal and Agent: AUTHORITY OF AGENT: EVIDENCE.** "That the party to whom money due another is paid is not in possession of the instruments by which the indebtedness is evidenced is not conclusive of the question of the authority, or lack of it, in the party receiving the money to collect it, but is a circumstance or fact to be considered in the determination of such question." *Thomson v. Shelton*, 49 Neb. 644,
2. ———: **PAYMENT: NEGLIGENCE.** Nor is the fact that the payor of a note pays the amount thereof to the payee or his agent, without demanding a cancelation and return of the note, conclusive evidence of negligence on the part of the payor in making such payment, but the question of negligence or want of negligence is to be determined as a question of fact from all the circumstances of the transaction and the relation of the parties at the time.
3. Paragraphs 2 and 4 of the syllabus in *Walker v. Hale*, ante, p. 829, applied to this case.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Affirmed.*

Ambrose C. Epperson, for appellant.

M. L. Corey, R. D. Sutherland and D. T. Barrett, contra.

FAWCETT, J.

In the main, the issues and the evidence in this case are substantially the same as in *Walker v. Hale*, ante, p. 829. The judgment of the court below was the same in this case as in that, and a similar judgment must be entered in this court. We deem it only necessary to call attention to one additional defense pleaded in this case which was not pleaded in that.

The note and mortgage in this case were executed and delivered to plaintiff by William I. and Mary E. Fine. The petition alleges that after executing the mortgage the

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4. Evidence examined and set out in the opinion, *held*, amply sufficient to sustain the findings and judgment of the district court.

APPEAL from the district court for Clay county:
LESLIE G. HURD, JUDGE. *Affirmed*.

Ambrose O. Epperson, for appellant.

S. W. Christy and L. E. Cottle, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Clay county, to foreclose a mortgage upon lots 8 and 9, in block 12, in the original town of Ong, in said county. From a decree finding that the note, which the mortgage was given to secure, had been paid and dismissing plaintiff's suit, plaintiff appeals.

The petition is in the usual form. It alleges the execution of the note and mortgage by defendants David W. Hale and wife; the subsequent sale of the premises by the Hales to one McCrain, who conveyed to one Nearhood, who conveyed to one Arthur B. Smock; that the Exchange Bank of Ong is the record holder of a mortgage given to it by defendant Smock. Smock and his wife and the bank were made defendants. The bank answered separately, setting up its mortgage from Smock, and prayed that, in case a decree of foreclosure is entered in favor of plaintiff, its mortgage should be taken into account. The defendants Smock answered, alleging ownership of the premises by defendant Arthur B. Smock; that he purchased the same subject to two mortgages from his grantor Nearhood to the defendant bank. Further answering, it is alleged that, at the time the note and mortgage set out in plaintiff's petition were given by the defendants Hale, J. O. Walker of Ong represented the plaintiff in the taking of said note and mortgage, and thereafter continued to represent plaintiff in the collection of the interest, and was authorized by plaintiff to

collect and receive the principal of said note; that on or about the first day of June, 1905, defendant David W. Hale paid to J. O. Walker \$300 upon the principal of the note; that after the payment of the \$300 defendants Hale sold the land to John M. McCrain, subject to \$300 remaining unpaid of the principal; that on or about the 6th day of February, 1907, McCrain paid the plaintiff the \$300 and interest to the date of said payment, being the balance of the debt represented by the note, "said payment being made at the town of Ong, Clay county, Nebraska, to J. O. Walker, the representative of the plaintiff and the person who made said loan and who had collected all the interest thereon up to said date;" that defendants purchased the premises January 1, 1908, went into possession thereof, have occupied the same to the time of filing the answer, and that they have never had any notice of the alleged claim of plaintiff until the bringing of this suit; "neither have they paid anything on the principal or interest of said alleged claim;" that the said J. O. Walker, to whom Hale and McCrain paid the debt, was representing the plaintiff at Ong, Nebraska, in the loaning of money, in the collection of the principal and interest on said loans and remitting same to the plaintiff, and that in the taking of the notes sued on and the mortgage given to secure the same, and in the collection of the principal and interest, the said J. O. Walker was the agent and representative of the plaintiff and had authority to receive the money so paid to him thereon in payment, satisfaction, and discharge of the indebtedness represented by said note; denied all other allegations in the petition; and prayed for a decree that the indebtedness represented by the note and mortgage had been fully paid by the payment to J. O. Walker, who was authorized by plaintiff to collect and receive the same in discharge of said debt, and that the premises described in plaintiff's petition be released and discharged from any lien under and by virtue of plaintiff's mortgage; that the mortgage be canceled of record, and for general relief. The reply

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to the answer of defendant Smock is a general denial. Defendants Hale answered that the making of said loan and all other transactions in connection therewith were had and done with J. O. Walker, who acted for and represented plaintiff in connection therewith; that all interest payments made by the defendants for the years 1901 to 1905, inclusive, were made to J. O. Walker; allege the payment of \$300 of the principal, as alleged in the answer of defendant Smock, and the sale of the premises to McCrain subject to the remaining \$300, which McCrain assumed and agreed to pay. The trial court found that, at the times and dates alleged in plaintiff's petition and the answer of Arthur B. Smock and Carrie Smock, J. O. Walker was the agent of the plaintiff at Ong, Nebraska, and as such agent was authorized to make loans, collect principal and interest thereon, cancel the notes and enter satisfaction of mortgages; "that the note and mortgage and the principal debt and the interest thereon were paid to J. O. Walker as alleged in the answer of Arthur B. and Carrie Smock, and is a complete satisfaction and discharge of said debt, and said defendants are entitled to have the mortgage canceled of record," and entered a decree in accordance with such findings.

J. O. Walker was plaintiff's nephew, and cashier of the Exchange Bank of Ong, of which his father, plaintiff's brother, was president. It appears from the evidence that J. O. Walker was the active manager of the bank and had the unlimited confidence of everybody in Ong and surrounding country. He died on or about December 17, 1908, and it was then discovered that through his skillfully manipulated and systematic dishonesty a large number of persons, among them some of his most trusting relatives and friends, were defrauded out of large sums of money, aggregating many thousands of dollars. One of his victims, whom he had deceived for many years, and who must now suffer the loss of a large sum of money by reason of the confidence which he placed in his nephew, is the plaintiff in this case. J. O. Walker seems to have

been no respector of persons. His uncle, with his thousands, and the poor man borrowing a few hundred dollars, alike became his victims.

The first point urged by plaintiff for a reversal is that, "if J. O. Walker was the agent and representative of the plaintiff and he in fact received and failed to remit to the plaintiff the moneys alleged to have been paid him, then upon his death the plaintiff would become his legal representative," and that the testimony of Hale and McCrain as to conversations and transactions with J. O. Walker, who is deceased, is barred under section 329 of the code, which provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation." No time need be spent upon this contention for three reasons: (1) The plaintiff is not the representative of the deceased. The deceased in his lifetime was the representative of plaintiff. (2) Plaintiff himself testified to his correspondence and dealings with J. O. Walker in reference to business generally and the note and mortgage in suit in particular. (3) The point is decided adversely to plaintiff's contention in *German Ins. Co. v. Frederick*, 57 Neb. 538, where we said: "Objection is made to the introduction of evidence as to the transactions of the insured with the agent, on the ground that the agent was dead at the time of trial. This fact seems to have been assumed, but it was not proved. However, the statute makes such testimony incompetent only where the adverse party is the representative of the deceased. Here that was not the case. The deceased in his lifetime had been the representative

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to secure the same; that, if demanded, "plaintiff could have investigated with said defendants the transactions alleged to have been had with the said mortgagee, J. O. Walker, and ample time would have been had to recover from him the amount paid, if any, for the benefit of plaintiff, by whomsoever was entitled to it. By reason of which neglect and carelessness of defendants, they are now estopped to allege payment of said indebtedness to the said J. O. Walker, for the use and benefit of the plaintiff."

We think a fair construction of plaintiff's petition and of the transcript from his books, which he introduced in evidence, is that, while the mortgage in controversy was taken in the name of J. O. Walker, it was in fact so taken by him for the plaintiff. The transcript from plaintiff's books, referred to, shows this entry: "Lillie W. Smith to J. O. Walker use H. P. Walker, March 1st, 1902, \$1,200 mortgage;" and the petition alleges that it was sold to plaintiff "at about its date." If that be true, then our opinion in *Walker v. Hale, supra*, would dispose of every feature of this case. Inasmuch, however, as the parties have argued the case as if it were an original loan by J. O. Walker, subsequently assigned to plaintiff, we will consider it as such. The reply of plaintiff charges that at the time Hart purchased the property from Smith he knew that the note and mortgage had been assigned to plaintiff. This allegation is unqualifiedly denied by the uncontradicted testimony of Mr. Hart. The case stands thus: Plaintiff before maturity purchased the note and mortgage from the mortgagee, kept his assignment (if he ever received one, which is not established in this case) from the records, and permitted the mortgagee for a number of years to deal with the mortgagor and his grantee, who had assumed the mortgage, as if he, the original mortgagee, were still the owner of the paper. And now, after such mortgagee has collected the full amount of the debt and duly executed a release of the mortgage, plaintiff comes into a court of equity and as-

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serts that the mortgagee was not his agent; that he is not bound by the payment made and the release given, and asks that he be permitted to compel defendants to pay the debt a second time. This cannot be permitted. In *Pine v. Mangus*, 76 Neb. 83, we held: "A mortgagee of real estate assigned its mortgage, and guaranteed the payment thereof, and thereafter collected the principal and interest, but failed to account therefor to its assignee, who instituted this action to foreclose the mortgage. Evidence examined, and *held* sufficient to show that the mortgagee was the agent of its assignee, and the payments to it satisfied the mortgage indebtedness."

We think the evidence, showing J. O. Walker to have been the general agent of plaintiff, would alone have been sufficient to sustain the judgment of the district court that the payment of the amount of the mortgage in controversy to J. O. Walker by Hart was a payment thereof to plaintiff; but, when we add to that the fact that plaintiff, without recording his assignment of the mortgage, permitted J. O. Walker, the owner of the mortgage as shown by the record, to deal with the defendants as if he were still the owner of the mortgage, and to collect from them the full amount of the debt, and in due form release the mortgage, it settles the question beyond all dispute that plaintiff's suit is without equity.

The judgment of the district court is therefore

AFFIRMED.

HIRAM P. WALKER, APPELLANT, V. ANDREW J. STEWART ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,905.

The syllabus in *Walker v. Smith*, ante, p. 841, applied to this case.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Affirmed.*

Ambrose C. Epperson, for appellant.

*Wilmer B. Comstock, R. D. Sutherland, D. T. Barrett
and M. L. Corey, contra.*

FAWCETT, J.

The pleadings and the evidence in this case are substantially the same as in *Walker v. Smith, ante*, p. 841. The judgment of the court below was the same in this case as in that, and a similar judgment must be entered in this court. The difference between the two cases only will be considered in this opinion.

In this case, as in *Walker v. Smith, supra*, the mortgage was executed to J. O. Walker. It was signed by William R. and Ella S. Thurber and was to secure a note in the sum of \$4,500. It was dated September 21, 1892. The petition alleges that before maturity of said note, "and on or soon after its date," Walker for a valuable consideration sold and assigned the same to plaintiff. It further alleges that after executing the mortgage the Thurburs conveyed the land to defendant Andrew J. Stewart, who is now the owner of the equity of redemption to all of the real estate described in the mortgage, except the west half of the northwest quarter of section 34, which he subsequently sold and conveyed to defendant Franson. In other respects the petition is in the usual form. The Columbia Fire Insurance Company was made a defendant, and filed an answer setting out a mortgage which, for the purpose of this case, need not be considered. The answer of defendants Stewart sets out the transaction by which they obtained their deed from the Thurburs, in which it is shown that they received their deed in exchange for other lands which they conveyed to the Thurburs. In that exchange each was to convey his land to the other clear of incumbrances. It then alleges that, in order to carry out the exchange, it became necessary for the defendants Stewart to secure a loan of \$7,000

from the Columbia Fire Insurance Company, and the sum of \$5,000 from some other source; that they secured an abstract of title to the lands of the Thurbers, including the lands described in the mortgage in suit, in which J. O. Walker appeared as the mortgagee, and sent it with his application to the Columbia Fire Insurance Company; that, after the company had passed on the title and accepted the same, papers were made out and defendants informed that the title was good and would be accepted; that defendants then signed notes to the Columbia Fire Insurance Company, one of which was for the sum of \$4,800, dated June 30, 1905, and covering the Clay county land; that, to secure the balance of money necessary to complete the deal, they borrowed \$5,000 in two sums of \$2,500 each, secured by a real estate mortgage to J. O. Walker, one of the mortgages being on the Clay county land; that at the same time Thurber, in order to carry out his part of the exchange, borrowed the sum of \$2,500 from the Columbia Fire Insurance Company, securing the same by a mortgage on other lands, and also borrowed \$3,000 from J. O. Walker and gave a mortgage on the same premises, and secured the money thereon in the full amounts of said mortgages, and with the proceeds thereof paid to J. O. Walker, "the mortgagee of the note and mortgage sued upon herein, the principal and interest due therein in full; and the said J. O. Walker then and there accepted the amounts due thereon in full payment thereof," and on July 8, 1905, in due form released the northwest quarter of section 34, described in the mortgage, and acknowledged payment of the debt therein described; that the release was duly recorded; that on July 20, 1905, Walker in due form released the other 80 acres described in the mortgage, and that the release was duly recorded; that in those releases payment of the mortgage debt is acknowledged. It is further alleged that Thurber paid the interest on the note sued upon from the time of its date, which was in September, 1892, to the time of the release of the mortgages by J. O.

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Walker, in July, 1905; that all of such payments were made to J. O. Walker, the mortgagee, and to no other person; that the mortgage was past due about eight years at the time of its payment and release, as above set out; that neither of the Thurbers nor the answering defendants had any interest, either in law or in equity, in and to the note and mortgage sued upon. The answer then sets out the agency of J. O. Walker for plaintiff, substantially as set out in *Walker v. Hale*, ante, p. 829. The reply to the answer of defendants Stewart is a general denial.

The evidence shows that plaintiff never at any time, until after the death of J. O. Walker in December, 1908, had possession of either the mortgage or the assignment, but that during all of the years from the time he alleges that he obtained the assignment on or soon after the date of the note, viz., September 21, 1892, until December, 1908, the mortgage and assignment remained in the possession and custody of J. O. Walker. The evidence also shows that plaintiff claims that each five years after the execution of the note it was extended for another period of five years, and by the extension of 1897 the rate of interest was reduced from 6½ to 5 per cent., but upon cross-examination plaintiff admits that no written extension was ever executed and that they were not made with the defendants. When asked with whom the extension was made, he answered: "The extension was made by J. O. Walker, but there was no writing of that kind; just a communication whether I would extend the time. Q. This application for an extension was made by J. O. Walker? A. Yes, sir. Q. Your reply in writing was to J. O. Walker? A. Yes, sir. Q. Did you ever have any agreement with William R. Thurber or Ella S. Thurber direct with regard to the change of the rate of interest? A. No, sir. Q. There was a payment of \$500, I believe? A. Yes, sir; 24th September, 1894. Q. You received the \$500 from J. O. Walker, did you? A. I think I did." The evidence, without conflict, shows that the assignment was

never recorded, and that none of the defendants ever had any knowledge or notice of plaintiff's interest in the note and mortgage until plaintiff asserted his claim after J. O. Walker's death. That J. O. Walker had authority to accept payment from the Thurburs of the principal is shown by the fact that about two years after plaintiff became the owner of the note, and nearly three years before its maturity, J. O. accepted a payment of \$500 of principal, for which he accounted to plaintiff, who made no objection to the action taken by J. O. either to him or to the Thurburs.

The facts above outlined, together with the general agency of J. O. Walker, as shown by the evidence, make it too clear to require discussion or citation of authorities that the payment of the debt to J. O. Walker was a payment to plaintiff. But it is argued by plaintiff that the evidence offered and admitted to show the payment of the debt to J. O. Walker was incompetent because prohibited by section 329 of the code. That is to say, that the testimony of the Stewarts and the Thurburs, in relation to the payment to J. O. Walker, is incompetent for the reason that, as J. O. Walker was the mortgagee, plaintiff as his assignee is his legal representative, and, J. O. Walker being dead, the testimony of these persons who are directly interested is incompetent. It is unnecessary to discuss this argument for the reason that plaintiff in chief testified in relation to the transactions in a manner that brought these witnesses within the exceptions noted in section 329, and for the further reason that no evidence was offered by the plaintiff to controvert the recitals contained in the releases executed and delivered by J. O. Walker that the debt had been paid to him in full.

We are unable to see where anything could be gained by a further discussion of this case. The judgment of the district court was clearly right, and it is

AFFIRMED.

HIRAM P. WALKER, APPELLANT, v. ALBERT F. CARLSON ET AL., APPELLEES.

FILED JANUARY 16, 1913. No. 16,906.

The syllabus in *Walker v. Rudd*, ante, p. 839, applied to this case.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Affirmed.*

Ambrose C. Epperson, for appellant.

Charles H. Sloan, Frank W. Sloan and J. J. Burke, contra.

FAWCETT, J.

The issues tendered by the pleadings in this case and the evidence responsive to those issues are in every essential particular the same as in *Walker v. Rudd*, ante, p. 839. The same judgment was entered by the trial court in this case as in that, and a similar judgment must be entered in this court.

Some evidence was introduced by both sides, and the briefs on both sides contain some slight discussion in reference to a switching of securities, or transfer of the mortgage from the lands described in it, which are located in Clay county, to certain lands in Fillmore county. As no such issue was either tendered by the pleadings or considered and determined by the trial court, it will not be considered here.

That payment of the note and mortgage was made to J. O. Walker is satisfactorily proved; that J. O. Walker was the agent of plaintiff generally in his loan business, and particularly in reference to the loan in suit, is clearly established. Upon the latter point plaintiff testified that he did not know any of the Carlsons, nor where they lived, nor whether there were actually any such persons in existence; that he did not know whether any one was living on the premises; that he did not receive an abstract of

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title, and when he took the paper did not know whether he had any security or not, except what was represented to him by J. O. Walker; that, so far as there being a mortgage on any land or land of any value, he relied upon the representations of J. O. Walker; that the only information he had was from him.

Complaint is made of the refusal of the court to require defendants to elect as to the defenses of actual and ostensible agency, both of which were pleaded. The trial was to the court, and, as the evidence sustains both defenses, plaintiff was not prejudiced by the ruling complained of.

Nothing would be gained by a discussion of this case. It is substantially the same in all respects as *Walker v. Rudd, supra*, and, for the reasons therein stated, the judgment of the district court is

AFFIRMED.

FRANK N. PHELPS, APPELLEE, V. JOHN W. BERGERS,
APPELLANT.

FILED JANUARY 16, 1913. No. 16,909.

1. **Husband and Wife: ALIENATION OF WIFE'S AFFECTIONS: EVIDENCE.**

In an action for damages for the alienation of the affections of the plaintiff's wife, she not being a party to the action, evidence of admissions made by her are incompetent. A witness testified that he saw plaintiff's wife coming out of the house of defendant, and after he followed her a short distance she made admissions in answer to statements of the witness. *Held*, That such admissions were not competent as *res gestæ*.

2. ———: ———: **DAMAGES: EVIDENCE.** In such action, evidence that plaintiff mistreated his wife, and was intimate with other women during the time in which he alleges that her affections were alienated, is competent as affecting the measure of damages; and when he testifies to injuries to his feelings, mental suffering, and such like matters as enhancing his damages, he may properly be cross-examined as to his conduct tending to show his failure to appreciate and value her affection for him.

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3. ———: ———: EVIDENCE. In such action, evidence that the defendant assisted plaintiff's wife in procuring a divorce, in furtherance of his main design to alienate her affections, is competent as a circumstance tending to prove the main issue. Such evidence should not be submitted to the jury as establishing a cause of action in itself.
4. ———: ———: MALICE. When her parent, or one to whom the wife naturally looks for advice, counsels her as to the best course to pursue relative to her marital trouble, the question of good faith or malice on the part of her adviser is important and calls for an instruction to the jury upon that point. When a stranger interferes in the family affairs of others, there is no presumption of good faith. In the latter case, an instruction that it is necessary to prove malice, and that the law presumes malice from wrongful acts, is unnecessary and improper.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed.*

Byron G. Burbank, for appellant.

McCoy & Olmsted, contra.

SEDGWICK, J.

The plaintiff began this action against the defendant in the district court for Douglas county, and recovered a verdict and judgment from which the defendant has appealed.

In his petition, as amended, the plaintiff alleges that he is 27 years old, and was born in the city of Omaha, and on the 23d day of June, 1906, he was married to Josephine M. Rhoda, who is now about 23 years old; that plaintiff and his wife had one child, a boy, who died in April, 1909, at about the age of 18 months; that the plaintiff and his wife lived happily together until about December 1, 1908, and that from about the 15th of November, 1908, until April 1, 1909, the plaintiff and his wife kept house at 2304 Dewey avenue, in the city of Omaha; and that about January 1, 1909, the defendant, having separated from his own wife, rented, furnished and moved into the house at No. 2321 Dewey avenue, and in close proximity to the

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plaintiff's said home; that since about the 1st day of January, 1909, the defendant has lived alone in his said house, except in this, that he kept and keeps there a Japanese or Korean cook or housekeeper; that since November 15, 1908, and until about April 15, 1909, the defendant, well knowing the said Josephine M. Phelps to be the wife of the plaintiff, and wrongfully contriving and intending to injure the plaintiff and deprive him of her company, assistance, love and service, did wilfully and maliciously, and without privity of consent of the plaintiff, and at defendant's said house and elsewhere in the city of Omaha at divers times during said period, persuade and induce plaintiff's wife to visit him at his rooms at 2321 Dewey avenue, aforesaid, and at other places now unknown to the plaintiff in the city of Omaha, and did then and there debauch and carnally know her, the plaintiff's said wife; that frequently during the time since November 15, 1908, and up to about April 15, 1909, and while the plaintiff was enjoying the comfort, affection, companionship and service of his said wife and having a household as aforesaid, the defendant studiously and continuously with wicked intent planned and undertook to deprive the plaintiff of the society, affections and assistance of his wife, and with such intent did so prejudice and poison plaintiff's wife's mind against the plaintiff, and so far alienated her affections from him, as to induce her to desire and seek to obtain a divorce and separation from him; and • that the defendant, for the purposes aforesaid, counseled, advised, aided, and assisted the wife of plaintiff in her efforts to procure the commencement of divorce proceedings against plaintiff, and that the defendant did by the means aforesaid so far prejudice and poison the mind of plaintiff's wife against her husband, and so far alienate her affections from him, as to persuade and induce her to refuse to recognize or receive the plaintiff as her husband; and that she, plaintiff's said wife, acting under such advice and influence, did refuse to recognize or receive the plaintiff as her husband or to live with him as his wife, and

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did, without any good cause, about April 1, 1909, sue the plaintiff for a divorce and for the custody of their child, Frank Phelps, and did cause plaintiff to be restrained and enjoined from visiting her, his wife, or their said child. And pursuant thereto, and for the reasons aforesaid, plaintiff's said wife did leave and desert her home and plaintiff, and take with her their said boy, Frank Phelps, and remove him to her mother's home in Omaha, Nebraska, where plaintiff's said child contracted the measles from a servant in that home and died on April 23, 1909, as a consequence thereof; whereby the plaintiff has wholly lost and been deprived of the comfort, fellowship, society and assistance of his wife, and whereby the plaintiff and his wife have lost their child as aforesaid. The plaintiff alleged damages in the sum of \$25,000. The defendant answered admitting plaintiff's age and the age of his wife as alleged, and their marriage, and residence of the plaintiff and his wife as alleged, and the birth and death of the child as alleged, and denied all other allegations of the petition. The jury rendered a verdict in plaintiff's favor for \$16,666.67. Upon a motion for a new trial, the court required the plaintiff to remit \$6,666.67 from the verdict and entered judgment upon the verdict for \$10,000.

Upon the trial the plaintiff, as witness in his own behalf, testified that he and his brother on the 12th day of April, 1909, watched the residence of the defendant from about 4:30 o'clock in the afternoon until a little after 8 o'clock in the evening, and that he was at that time about 20 feet from the back door of Bergers' home, and saw his wife come out of the back door of Bergers' house to the sidewalk, and the plaintiff followed her. He overtook her shortly, and they were then joined by plaintiff's brother, Alfred. The plaintiff then by his counsel was asked if he had any conversation with his wife when he first caught up with her at that point, and he answered that he did; and was then asked: "What did you say to her?" This was objected to "as hearsay, incompetent, irrelevant and immaterial; no ways binding upon the de-

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fendant." The plaintiff's counsel stated that it was a part of the *res gestæ*. The court allowed the plaintiff to answer, and the defendant excepted to the ruling. The plaintiff answered: "I said, 'Well I have caught you red-handed at last.'" His counsel then asked him: "What did your wife say to you at that time?" The defendant interposed substantially the same objections as before, which were overruled, and the plaintiff excepted. The witness answered: "She said, 'Well, as long as I am caught, I might as well own up to it.'" The admission of this evidence is now assigned as error. This evidence was clearly incompetent. The wife was not a party to the suit. She therefore could not make admissions that would be binding upon the defendant. If the defendant was with her in his house, they were separated at the time this statement was made by her. It is said in *Collins v. State*, 46 Neb. 37: "The term '*res gestæ*' means things done in and about, and as a part of, the transaction out of which the litigation in hand grew and on which transactions said litigation is based." The statement of Mrs. Phelps was not any part of the transaction that took place at the house, and was therefore nothing more than an admission that she had been in the house of Mr. Bergers without any explanation of her purpose in being there. It is not necessary to determine whether, in the condition of this record, the error in receiving this evidence would be so prejudicial as of itself to require a reversal, since that question will not of course be presented upon another trial.

The defendant insists that the court erred in refusing to permit necessary cross-examination of the plaintiff. The plaintiff had testified substantially that the alienation of his wife's affections and her relation with the defendant caused him great worry and a nervous breakdown, and that by reason of it he was obliged to give up his position in order to recover his health. Upon his cross-examination it was sought to show that, during the time of the alleged intimacy between Mr. Bergers and the plaintiff's wife, the plaintiff himself was upon very

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friendly relations with other married women. He was asked: "You have been going around a good deal with Mrs. Kennedy, haven't you?" Objection to this question was sustained, and the defendant excepted, and said: "I offer to show that he had been going around a good deal with Mrs. Kennedy." This was objected to and was refused. The witness was then asked: "Well, you knew, did you not, that Mrs. Phelps was watching you with reference to your conduct with other women, didn't you, from and after April 1, 1909?" Objection was sustained to this question, and defendant's attorney stated: "I offer to show by the witness that he knew that Mrs. Phelps was watching him as to his conduct with other women from and after April 1, 1909." This was objected to and the objection sustained. In view of the plaintiff's testimony and the conditions that he testified to for the purpose of increasing the amount of damages that he might recover, it was clearly competent to show his intimacy with other women in the time specified. The plaintiff insists that this would be a substantive defense, and if relied upon by defendant should be alleged and proved as such. There was no such defense pleaded in the answer. The cross-examination, however, might properly have been allowed as throwing light upon the plaintiff's evidence as to the damages suffered by him in the particulars above mentioned.

The offer of proof made by defendant's counsel was not very comprehensive. It has been said by this court that no offer of proof is necessary upon the cross-examination of witnesses. If, however, it is not apparent from the question asked that the matter which it is sought to investigate is a proper subject of cross-examination, it is necessary to inform the court how the question asked will be connected with the examination in chief. Counsel should make it appear that his questions will legitimately lead to a proper subject for cross-examination of the witness. When it appears from the statement of counsel or offer of proof, in connection with the questions he pro-

pounds, that the matter is a proper and necessary subject of cross-examination, the court will of course allow the questions. The proof offered, and at first excluded, seems to have been substantially admitted later, so that defendant was not prejudiced, unless his evidence of this character was apparently discredited by the rulings of the court thereon.

Plaintiff's wife began an action against him for a divorce on the first day of April, 1909. The court submitted to the jury an instruction stating as one of the issues presented that "the defendant procured or was party to the procuring of a divorce action brought by plaintiff's wife against him in furtherance of a design on defendant's part to destroy plaintiff's said family and home relation with his wife." The main issue tried was whether the defendant had alienated the affections of the plaintiff's wife. Evidence that the defendant assisted her or encouraged her in procuring a divorce was perhaps competent under the circumstances as bearing upon the main issue. It should not have been singled out and given in charge to the jury. This seems to be conceded in the plaintiff's brief, but it is insisted that objection was not made in time, and that the error was immaterial and was waived by the defendant. It is of course not necessary to discuss these features of the matter, as the error of giving this instruction will not be repeated upon another trial.

The court gave the following instruction: "You are instructed that any enticements of the plaintiff's wife, if any, by the defendant, with a view of causing a separation, otherwise than those of an adulterous nature, must be shown to have been maliciously done; but the law presumes malice, if one wrongfully does acts tended to disturb the harmony of the family relations between husband and wife, and concludes that such acts were malicious." It is insisted that it was error to tell the jury that the law presumes malice. There may be some doubt whether the jury would consider the word "tended" as meant for "intended" or for "tending." If the wrongdoer intended

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that his wrongful acts should disturb the family relations between husband and wife, such conduct would be malicious. When a parent, or one to whom she naturally looks for advice, counsels a wife as to the best course to pursue relative to her marital troubles, the question of good faith or malice on the part of her adviser becomes important and calls for an instruction upon that point. The usual practice in such cases is to define malice and leave the question to the jury as to whether or not the defendant was actuated by malicious motives. When a stranger interferes in the family matters of others, there is no presumption of good faith. If his acts were wrongful and calculated to alienate the wife's affections from her husband, and did in fact produce that result, he is liable for such damages as he occasions. The first part of instruction No. 5 was erroneous as against the plaintiff, and the latter part as against the defendant. No such instruction in this case is called for.

The defendant insists that there was not sufficient evidence in the record to sustain the verdict based upon the second cause of action alleged in the petition; that is, the seduction by defendant of plaintiff's wife, and committing adultery with her. It is not deemed advisable to determine or discuss this assignment, since the plaintiff may produce different and further evidence upon another trial.

In his petition the plaintiff asked for \$25,000 damages. The verdict was for precisely two-thirds of that amount. Upon a motion for a new trial in the court below, affidavits of the jurors who tried the case were filed tending to show how the jury arrived at this verdict. It is insisted that these affidavits show that it was agreed by the jury that each juror should mark the amount that he thought the plaintiff should recover; that these amounts should be added together and the sum divided by the number of jurors to estimate the amount of the verdict, and that this result was so near two-thirds of the amount asked for by the plaintiff that they agreed to accept that amount as the proper verdict. It is insisted that this was

such improper conduct on the part of the jury as to require a reversal. The affidavits of several of the jurors were filed denying that the verdict was so arrived at, and explaining the matter in such a way as to show no gross impropriety in their method. Upon this conflicting evidence the trial court found that there was no such misconduct shown as to require a new trial, and without further discussing the evidence on this point we are satisfied that this finding of the trial court is supported by the evidence.

On the 1st day of April, 1909, the plaintiff's wife began an action for a divorce. They never lived together after that time, and when the case at bar was tried in the district court the divorce had been granted. The plaintiff testified that from the time of their marriage, which was something less than three years before the action for divorce was begun, until some time in November, 1908, their marriage relations had been pleasant and in all respects satisfactory. He testified that in November, or early in December, 1908, their relations were changed. "She became indifferent to me and the home in general." He was asked whether from the 15th day of November, 1908, until April 1, 1909, his wife's attitude toward their infant child and their home was different from what it had been prior to that time, and answered: "It was, she seemed to be indifferent." She testified that during all of their married life he was abusive to her, and was very frequently guilty of acts of personal violence against her. In this she was corroborated by her mother, and to some extent by other witnesses who seemed to be disinterested and reliable. It would seem that, whoever was at fault for the alienation of her affection for her husband, it had been substantially accomplished on or before the 1st day of April, 1909. There is no evidence that she knew or had ever seen defendant prior to some time in January, 1909, several weeks after the process of alienation had begun, according to the plaintiff's testimony. In January, 1909, the plaintiff's wife with a young lady and a small

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child, attended the automobile show in Omaha, and there she casually met the defendant. There is no evidence of any impropriety or anything unusual under such circumstances between them on that occasion. The plaintiff testified that on the 26th day of March, 1909, he heard a conversation between his wife and Mr. Bergers on the telephone which would indicate improper relations between them at that time. He is not supported in this testimony, and both his wife and Mr. Bergers deny that they ever had any conversation over the telephone at any time. Several circumstances are testified to as occurring after the divorce proceedings were begun that would indicate similar relations between her and Mr. Bergers. The plaintiff and his brother testify as to having watched Mr. Bergers' house some time during April, and that they saw the plaintiff's wife come out of the back door of the house, and that she then substantially admitted to them that she had been in Mr. Bergers' house for some time. Again, another witness testified that about the 1st of April he saw her coming out of Mr. Bergers' house. This might have been before or after the commencement of the divorce proceedings, as the witness testified, "I don't know anything about the date." Another witness saw her and Mr. Bergers talking in one of the public buildings of the city. This was about the time the divorce proceedings were begun. She and Mr. Bergers both testified that this was a casual meeting and only a few words passed between them, which was not disputed. While the divorce proceedings were pending, and after the case at bar was begun, on the invitation of Mrs. Phelps' parents, Mr. Bergers called at their home, where she was living. From that time on Mr. Bergers seems to have taken an interest in her relations with her husband, and in furthering the prosecution of her suit, as well as in the defense of his own. The plaintiff was very active in watching the actions of his wife while these suits were pending. He says that he was frequently driving with his automobile to keep watch of her and Mr. Bergers. On these occasions he generally took some female

companion with him to assist in the watch, and particularly and frequently a certain married woman, whom he says had formerly been a schoolmate of his, and with whom he was on quite friendly terms. On the other hand, his wife was also watching him, and the evidence shows that Mr. Bergers continually assisted her in this. During this time the plaintiff's wife and Mr. Bergers were frequently seen driving in his automobile, and they made no denial of it on the witness stand.

We think that the evidence upon the main issue presented was sufficient to justify a submission of the case to the jury. There was, however, no evidence to justify a verdict in the amount found. When we consider the relation that had existed between the husband and wife before she had ever seen or known anything of the defendant, and the plaintiff's surroundings and conduct before and after their separation, it is impossible to believe that this verdict of \$16,666.67 was based upon any consideration by the jury of the actual damages that the plaintiff might have suffered. It clearly shows that the verdict was derived from something other than the evidence in the case. A verdict so obtained cannot be allowed to stand. The trial court required the plaintiff to remit a large part of the verdict. If the verdict had been of such a nature as to justify the belief that the jury had attempted to derive their verdict from the evidence, a remittitur might be required and an affirmance justified; but when it appears that the verdict must have been reached from passion or prejudice, or through some influence outside of the evidence, it is the duty of the court to set it aside.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ADOLPHUS M. ALLEN, APPELLEE, v. DAWSON COUNTY ET
AL., APPELLANTS.

FILED JANUARY 16, 1913. No. 16,919.

1. **Taxation: LISTING PROPERTY.** One who takes cattle and hogs upon his farm to keep and feed for a nonresident of the county has control of them for the owner, within the meaning of section 10927, Ann. St. 1911, and is required to list such property for taxation.
2. ———: **INJUNCTION.** If such stock is assessed in the name of the person so in control of such stock on the 1st day of April, and he purchases the same after that date, but before they are actually assessed, and afterwards disposes of the stock, he cannot enjoin the collection of the tax against his property generally on the ground that he was not the owner of the stock on the 1st day of April.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Reversed with directions.*

T. M. Hewitt and E. A. Cook, for appellants.

Warrington & Stewart, contra.

SEIGWICK, J.

The plaintiff began this action in the district court for Dawson county to enjoin the collection of a personal property tax. The district court enjoined the tax perpetually as prayed, and the county has appealed.

There is no substantial conflict in the evidence. It appears that the plaintiff is the owner of a farm in Dawson county, and that some months prior to the 1st day of April, 1909, one Wulff, of South Omaha, sent several hundred head of cattle and some hogs to the plaintiff's farm, where they were kept and fed. The plaintiff testified that while the cattle were on his farm one William Kountz, who was sent out by Mr. Wulff, had charge of them. The cattle were, however, in plaintiff's yards and were being fed with plaintiff's hay. He testified that Wulff "was to pay me for my teams and men, and for the engine and steam

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for grinding and preparing the feed." Without doubt the cattle were in the plaintiff's control within the meaning of the statute. Mr. Wulff, plaintiff testifies, "is a stock-broker, commission man at South Omaha." He also testifies that soon after the 1st day of April, and before the cattle were actually listed for assessment, he bought the cattle and hogs, and still continued to keep them on his farm. The evidence shows that the assessor went to his farm to assess the plaintiff about the 1st day of April, and the plaintiff was not at home. Soon afterwards he called there again, and the plaintiff informed him that he was sick and unable to attend to the matter. The third time he called in the latter part of May, and, the plaintiff still not being at home, the assessor conferred with the men who were in charge of the plaintiff's farm in his absence, and they listed the cattle and hogs, and one of them signed the assessment schedule, signing the plaintiff's name, "by Charles Fletcher," without specifying the capacity in which he signed it. Plaintiff claims that the tax was void because the property was not his property on the 1st day of April and ought not to have been assessed to him. There appears to be no other question presented; and it is not claimed that the property was assessed or taxed, unless this assessment and tax is valid.

We think the district court was in error in enjoining the tax. Section 10927, Ann. St. 1911, requires that every person shall list all personal property controlled by him as the agent or on account of any other person, county or corporation whatsoever. It was then the duty of this plaintiff to list this property as property under his control on the 1st day of April. If he had done so, he would have had a lien upon the property "for the taxes thereon until he is indemnified against the payment thereof." Ann. St. 1911, sec. 10915. If the property had been properly assessed as the property of Mr. Wulff in the name of this plaintiff as his agent, it would have been the duty of the plaintiff to keep possession of the property until he was indemnified, and would of course require him to see that

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the taxes were paid. Soon after the 1st day of April, and before the assessment, he bought these cattle himself, and he cannot now be heard to say that he is not liable for the taxes.

The judgment of the district court is reversed and the cause remanded, with instructions to dismiss the action.

REVERSED.

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6. Where an order dismissing the case was omitted from the record and transcript by the county judge, the district court may return the transcript so that a *nunc pro tunc* entry may be made. *Goetz Brewing Co. v. Wain*..... 614
7. On appeal from the county court, the district court may order the transcript to be returned to the county judge for proper certification. *Goetz Brewing Co. v. Wain*..... 614
8. Where the district court has sent a transcript to the county judge for certification, the failure of the county judge to return it duly certified within the time allowed for taking appeal will not deprive the district court of jurisdiction. *Goetz Brewing Co. v. Wain*..... 614
9. Error in refusing a continuance will not be considered, where plaintiff dismissed her action, and the cause was tried on the cross-petition of defendant, and there was no further application for continuance on the trial of the cross-petition. *Shevalier v. Stephenson*..... 675
10. Error in favor of the losing party is not ground for reversal. *Woodcock v. Unknown Heirs of Crosby*..... 723
11. Questions presented by amendment to motion for new trial, made more than three days after verdict, and without a find-

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- ing that the party was unavoidably prevented from presenting such questions within time, will not be considered by the court. *Davis v. Taylor & Son*..... 769
12. The supreme court will not by judicial notice introduce into the record facts of which the trial court had no knowledge. *Fassler v. Streit* 780
13. The findings and judgment of the trial court will be set aside where they are clearly against the weight of evidence. *Tyler v. Hoover* 221
14. A verdict on conflicting evidence will not be disturbed. *Kinney v. Chicago, B. & Q. R. Co.*..... 383
Schmidt v. Village of Papillion..... 511
15. In reviewing a direction of verdict for plaintiff, the court will assume the existence of every material fact which the evidence of defendant establishes or tends to prove, and proper inferences from such facts. *Central Nat. Bank v. Ericson* 395
16. Affidavits on motion for new trial cannot be considered unless preserved in a bill of exceptions. *Schmidt v. Village of Papillion* 511
17. The supreme court will not consider a purported bill of exceptions when not authenticated. *Union Stock Yards Nat. Bank v. Lamb* 608
18. In a law action tried to the court, the findings have the force of a verdict. *Providence Jewelry Co. v. Gray Mercantile Co.* 633
19. On appeal in equity, it will be presumed that the court decided the case solely on competent evidence, and no errors in receiving evidence will be considered. *Shevalier v. Stephenson* 675
20. The supreme court must consider an appeal on the evidence before the trial court, except where new matter arising after the entry of judgment is brought into the case by supplemental proceedings. *Fassler v. Streit*..... 786
21. Failure to instruct as to the burden of proof will not require a reversal, when no such instruction was requested. *Chalupa v. Tri-State Land Co.* 477
22. Where plaintiff was not guilty of contributory negligence, the submission of that question by an erroneous instruction is not prejudicial to defendant. *Mitchell v. Omaha Packing Co.* 496
Beebe v. Scott's Bluff County..... 501

Appeal and Error—Concluded.

23. If a verdict is the only one justifiable by the evidence, the instructions will not be examined. *Schwartz v. Anderson*.. 603
24. The refusal of an instruction as to agency of husband held not ground for reversal, where the evidence is not preserved. *Union Stock Yards Nat. Bank v. Lamb*..... 608
25. Where the verdict and judgment are the only ones which could be legally returned under the evidence, the instructions will not be examined. *Goetz Brewing Co. v. Wain*.... 614

Bailment.

Where a bailee returns property bailed in a damaged condition, the burden is on him to show that the damage did not occur through his negligence. *Davis v. Taylor & Son*..... 769

Banks and Banking.

1. So much of the depository law of 1891 (laws 1891, ch. 50) as required depository banks to give bonds for deposits of public funds is repealed by sec. 46 of the banking act of 1909, as amended by ch. 8, laws 1911; and a state bank by complying with that act is entitled to its *pro rata* share of public funds without giving bond. *State v. Hevelone*..... 748
2. A bank held not liable to a depositor for failure to pay a check in currency, where he subsequently accepted a draft and immediately transferred it and used the proceeds; the draft being paid by the drawee. *First Nat. Bank v. Wheatley*, 807

Bills and Notes. See EVIDENCE, 1. PLEADING, 3.

1. Settlement of a disputed claim may constitute a consideration for a note, if the claim is made by the payee in good faith, though he may be mistaken as to the basis thereof. *Musser v. Musser* 387
2. Where the consideration for a note was a disputed claim as to whether a prior note had been altered before or after delivery, if the claim was made in good faith, plaintiff need not establish that the maker altered it after its execution. *Musser v. Musser* 387
3. An instruction for plaintiff on the ground that a note was purchased from an innocent holder is erroneous, where reasonable men may properly infer from all the evidence that the holder in making the purchase acted for plaintiff, who had actual knowledge of valid defenses. *Central Nat. Bank v. Ericson* 393
4. Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder. *Central Nat. Bank v. Ericson*..... 396

Bills and Notes—Concluded.

5. In an action on a note, where coverture is a defense, and it is not alleged in the petition that defendant is a married woman, defendant must allege and prove the fact. *Union Stock Yards Nat. Bank v. Lamb*..... 608
6. In an action on a note, if it is proved that defendant is a married woman, the burden is on plaintiff to prove that the contract was made with reference to and for the purpose of binding her separate estate. *Union Stock Yards Nat. Bank v. Lamb* 608
7. The negotiable instruments act (Comp. St. 1905, ch. 41) does not apply to negotiable instruments executed and delivered before it went into effect. *Fassler v. Streit*..... 786
8. While an assignment of a mortgage may be effective to transfer the equitable title to the note secured, it is not a commercial indorsement cutting off defenses available to the maker against the original payee. *Fassler v. Streit*... 786

Brokers.

- An agreement between partners that one partner may sell partnership land is not within sec. 74, ch. 73, Comp. St. 1911, relating to brokers' contracts to sell lands. *Majors v. Majors* 473

Burglary. See CRIMINAL LAW, 22.

1. Information held sufficient to sustain a conviction of burglary. *Hardin v. State*..... 298
2. Evidence held to establish the *corpus delicti*. *Hardin v. State* 298
3. Evidence held to sustain conviction. *Hardin v. State*..... 298

Carriers.

1. Evidence in an action for injury to live stock held insufficient to sustain judgment for plaintiff. *Ward v. Chicago, St. P., M. & O. R. Co.*..... 183
2. Verdict against a carrier for damages from delay in transporting live stock held sustained by the evidence. *Kiser v. Chicago, B. & Q. R. Co.*..... 531
3. In an action by a shipper against a railroad company to recover for grain doors for box cars used in an interstate shipment, held that an answer that the interstate commerce commission had made a rule that a carrier cannot reimburse shippers for such expense, unless expressly so provided in its tariff, failed to state a defense. *Hanks v. Missouri P. R. Co.* 591
4. There being no allegation in an answer as to when a rule of the interstate commerce commission relied on as a defense to an action for grain car doors was adopted, it will not be

Carriers—Concluded.

presumed to have been adopted before the car doors were furnished. *Hanks v. Missouri P. R. Co.*..... 594

Charities.

1. A charitable institution conducting a hospital solely for philanthropic purposes is not liable to inmates for negligence of nurses. *Duncan v. Nebraska Sanitarium & Benevolent Ass'n* 162
2. A charitable institution, by accepting compensation from a patient, does not thereby incur liability for negligence of nurses. *Duncan v. Nebraska Sanitarium & Benevolent Ass'n* 162
3. A charitable institution is not necessarily liable for death of an insane patient who committed suicide, though pay for her care was accepted under an oral agreement to keep a nurse in constant attendance. *Duncan v. Nebraska Sanitarium & Benevolent Ass'n*..... 162

Compromise and Settlement.

1. In an action on a compromise, plaintiff must allege a reasonable foundation for his claim, and that it was made in good faith. *Majors v. Majors*..... 473
2. A petition to recover on a settlement or compromise which does not show a consideration for the contract is demurrable. *Majors v. Majors* 473

Constitutional Law. See DRAINS, 1. ELECTIONS, 4. LICENSES, 3. WATERS, 1, 7.

1. Where a statute authorizes a proceeding under the police power affecting property rights, and does not expressly provide for notice to the property owner, the right to notice is implied, and where it is given under a procedure authorized by the legislature, and the party has appeared, he is not deprived of his rights without due process of law. *Enterprise Irrigation District v. Tri-State Land Co.*..... 121
2. An ordinance making it unlawful for one operating a motorcycle to carry another person on the machine in front of the operator held a valid exercise of police power. *In re Wickstrum* 523
3. Ch. 42, laws 1905, relating to relocation of county seats, is void, under sec. 15, art. III of the constitution, as local and special legislation. *State v. Kelso*..... 623
4. A classification limiting provisions of a statute to a certain class then in existence, when applied to the relocation of county seats, is local and special legislation. *State v. Kelso*.. 623
5. Secs. 31, 32, ch. 32, Comp. St. 1911, known as the "Bulk Sales

Constitutional Law—Concluded.

- Law," are not unconstitutional as legislating upon a subject not clearly expressed in the title. *Appel Mercantile Co. v. Barker* 669
6. Secs. 31, 32, ch. 32, Comp. St. 1911, making all sales in bulk void as to creditors unless certain specified conditions are complied with, do not render the conditions separate subjects of legislation, within sec. 11, art. III of the constitution. *Appel Mercantile Co. v. Barker*..... 669
7. Secs. 31, 32, ch. 32, Comp. St. 1911, do not violate sec. 3, art. I of the constitution, which provides that no person shall be deprived of his property without due process of law. *Appel Mercantile Co. v. Barker*..... 669
8. Secs. 31, 32, ch. 32, Comp. St. 1911, apply to all people of the state who engage in the business designated, so that the classification is not arbitrary so as to render the act special legislation. *Appel Mercantile Co. v. Barker*..... 669

Continuance. See APPEAL AND ERROR, 9. JUSTICE OF THE PEACE.

Contracts. See EVIDENCE, 5.

1. One who has contracted to convey to a street railway company land for right of way purposes, and thereafter seeks to rescind the contract for fraud, must act promptly on discovery of the facts. *Ensign v. Citizens Interurban R. Co.*... 363
2. Parol contract held to possess requisite elements of certainty, and to be established by clear and satisfactory evidence. *Moline v. Carlson*..... 419
3. In an action for tuition, evidence held insufficient to sustain judgment for defendant. *International Text-Book Co. v. Martin* 430
4. In an action on a written contract, where defendant denies plaintiff's allegation that he has performed, the burden is on plaintiff to sustain the allegation. *Witt v. Old Line Bankers Life Ins. Co.*..... 763

Costs. See INJUNCTION, 4.

Counties and County Officers. See CONSTITUTIONAL LAW, 3, 4.

1. Under sec. 4466, Ann. St. 1911, the county board alone has authority to deduct delinquent personal taxes from claims allowed against the county. *State v. Johnson*..... 736
2. The county board acts judicially in the allowance of claims and the deduction of delinquent personal taxes from the amount due, and in rendering judgment for the remainder. *State v. Johnson*..... 736

Courts.

1. In an action against the coroner and his surety for the value

Courts—Concluded.

of personal property sold to pay funeral expenses, the district court should adjudicate the whole matter, instead of rendering judgment against the defendants and then sending the coroner to the county court to file claims against the estate.

Lenderink v. Sawyer..... 587

2. Under sec. 28, ch. 19, Comp. St. 1911, the district court may, by rule, compel an inferior court or board to allow an appeal, or to make or amend records. *Goetz Brewing Co. v. Wain*... 614

Creditors' Suit.

1. To maintain a creditor's bill, proof of a judgment at law, of the issuance of an execution and a return *nulla bona* is sufficient, in the absence of fraud or collusion, to show that plaintiff's remedies at law have been exhausted. *Parsons v. Oathers* 525
2. In equity, the interest of a judgment debtor in a judgment against a city may be subjected to the claim of his judgment creditor. *Parsons v. Oathers*..... 525
3. Failure to dismiss a creditor's bill on an answer alleging that plaintiff has possession of unsold collateral security, held not reversible error, where plaintiff, before reply, sold the collateral and applied the proceeds, and no one was prejudiced. *Parsons v. Oathers*..... 525
4. The contract of husband and wife to support the father of the husband and pay him \$50 a year is a personal contract, and the rights of the father thereunder cannot be subjected to the payment of a judgment against him. *Valparaiso State Bank v. Schwartz*..... 575
5. Where the consideration for a contract of husband and wife to support the father of the husband was the conveyance of the father's homestead, on which he retained a lien to secure performance of the contract, his interest will not be subjected to a judgment on an indebtedness incurred after the transfer. *Valparaiso State Bank v. Schwartz*..... 575

Criminal Law. See BURGLARY. DRUNKARDS. EMBEZZLEMENT. HOMICIDE. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS. RAPE.

1. Arguments and insinuations to the jury, not based on competent evidence, are improper. *Kanert v. State*..... 14
2. In a prosecution for rape, where there is evidence of several distinct crimes, and the prosecution has been required to elect on which it will proceed, the court should so charge; and it is error to instruct the jury that if the accused committed the offense, and complainant was under the age of 15 years, they should find accused guilty "as charged in the indictment." *Kanert v. State*..... 14

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3. An instruction that, if the state has failed to establish "each and every" one of the material allegations, the jury must acquit, is not prejudicially erroneous, because of the use of the words "each and every" instead of the word "any."
Larson v. State..... 24
4. The accused's mental condition as affecting his responsibility is a question for the jury, and not the court. *Larson v. State*..... 24
5. It is without prejudice to accused to instruct in a trial for felony that certain facts stand admitted, when the accused and other witnesses have testified to such facts, and there is no evidence to the contrary. *Goldsberry v. State*..... 211
6. If the court submits the question as to the venue of a crime fully and fairly, it is not prejudicial error to tell the jury that they have nothing to do with the law question involved in determining the proper venue. *Goldsberry v. State*..... 211
7. If accused desires instruction upon matters not mentioned by the court in its instructions, he should request the same. *Goldsberry v. State*..... 211
8. Objection that important matters were omitted from the instructions, without specifying what those matters were, will not ordinarily be considered. *Goldsberry v. State*..... 211
9. Where a plea in abatement presents questions of law only, it is proper for the trial court to determine them. *Hardin v. State* 298
10. Refusal of requested instructions is not reversible error, where the court has fairly instructed on defendant's theory of the case. *Stehr v. State*..... 755
11. An instruction defining reasonable doubt, which included the words "and instructions of the court," held not erroneous. *Stehr v. State*..... 755
12. One not an expert cannot give his opinion of the sanity of accused without first showing such knowledge of accused as would enable him to form an opinion. *Larson v. State*..... 24
13. If an expert witness fails to testify to facts and conditions observed on which to form an opinion as to the sanity of accused, or that what he had observed was sufficient to enable him to form an expert opinion, it is error to allow him to testify that he has not observed anything that led to the conclusion that accused was insane. *Larson v. State*..... 24
14. Where accused, without objection, answered questions on cross-examination as to treatments by his physician, held that he did not waive his privilege to object to the phys-

Criminal Law—Concluded.

- cian's testifying to confidential communications between them. *Larson v. State*..... 24
15. Though it is error to allow a writing in evidence as the writing of accused without proof of his signature or otherwise identifying it as written or authorized by him, yet, if the substance of the writing is testified to by accused, the error is without prejudice. *Larson v. State*..... 24
16. Where misconduct of a bailiff in charge of a jury is alleged in a motion for new trial, and the issue is submitted on conflicting affidavits, the decision of the district court will not be reversed unless clearly wrong. *Thrasher v. State*..... 110
17. Where objections to the impaneling of the grand jury are presented by plea in abatement, though there is no ruling thereon, the objection is waived, and cannot be taken by motion in arrest of judgment. *Goldsberry v. State*..... 211
18. A nonresident attorney may be selected to assist the county attorney in felony cases, under the direction of the court, and he must qualify as directed by sec. 3, ch. 7, Comp. St. 1911. *Goldsberry v. State*..... 211
19. It will not be presumed that the trial court neglected to administer an oath to an assistant for the prosecuting attorney. *Goldsberry v. State*..... 211
20. The recital in an affidavit filed with motion for new trial that the assistant prosecutor did not take the required oath will not establish that fact. *Goldsberry v. State*..... 211
21. Objection that the prosecuting attorney is guilty of misconduct at the trial must be taken at the time, and it is too late if made for the first time in motion for new trial. *Goldsberry v. State*..... 211
22. The words "railroad car" in sec. 1, ch. 184, laws 1905, held to come within the title of an act relating to burglary. *Hardin v. State*..... 298
23. Evidence as to admissions by accused, in a prosecution for burglary of a railroad car, held insufficient to show that the admissions were obtained under threats. *Hardin v. State*.. 298
24. A doctor who dressed the wounds of one accused of drunkenness held incompetent to testify to his condition, under sec. 333 of the code. *Freeburg v. State*..... 346
25. On a prosecution of a judge of election for having misread ballots cast, the ballots are the best evidence of how and for whom they were cast; and, unless they have been lost or mutilated, secondary evidence is not admissible. *Deeder v. State* 662

Damages. See EMINENT DOMAIN, 3-5. MUNICIPAL CORPORATIONS, 5. REPLEVIN, 3. SALES, 2, 4. WATERS, 12, 15.

1. In an action for damages to growing crops, the amount of damage is a question for the jury. *Chalupa v. Tri-State Land Co.*..... 477
2. The difficulty of determining the amount of damage is not ground for denying recovery for wilful injury to growing crops. *Chalupa v. Tri-State Land Co.*..... 477

Deeds.

1. Where a father conveyed land to his daughter by deed, which was returned to the father for correction, and not returned to the daughter, *held* that she had an equitable title to the land. *Holladay v. Rich*..... 91
2. In a suit to cancel a deed as procured by undue influence and by promise of services never performed, decree for defendant *held* sustained by the evidence. *Moore v. Britizus*.. 401
3. A deed to a partnership in its firm name is not void, but vests an equitable estate in the firm for the benefit of the partnership business and creditors, and of the partners. *Dineen v. Lanning*..... 545
4. A mutual mistake in description in a deed will warrant its reformation to conform to the intention of the parties. *Burke v. Welch*..... 773

Depositions. See INJUNCTION, 5, 6.

1. An officer authorized to take depositions may, at the request of a party, take the deposition of the opposing party, and may issue a *subpoena duces tecum*, and compel his attendance as a witness. *Old Line Bankers Life Ins. Co. v. Witt*.. 743
2. An attorney having the custody of documents and papers belonging to one of the parties may be required to produce such documents and papers as the client would be required to furnish. *Old Line Bankers Life Ins. Co. v. Witt*..... 743

Descent and Distribution. See WILLS, 2.

Manner of descent of realty under sec. 1, ch. 23, Comp. St. 1907, stated. *Whitford v. Kinzel*..... 373

Divorce.

1. Evidence *held* to justify a decree of divorce for extreme cruelty and habitual drunkenness. *Boza v. Boza*..... 73
2. The mother is the only proper custodian of two children who, at the time she obtained a divorce, were one and three years old, respectively. *Boza v. Boza*..... 78
3. Where the amount of alimony cannot be placed in a lump sum without hardship to defendant, and uncertainty to

Divorce—Concluded.

plaintiff, the court should provide for the payment of a stated sum distributed over fixed periods of time. *Bora v. Bora* 78

4. Decree granting a husband a divorce on the ground of extreme cruelty *held* proper. *Cronk v. Cronk*..... 534

Drains.

1. Sec. 24, art. V, ch. 89, Comp. St. 1911, providing that drainage districts may dig ditches under and across railroads and public highways, is not violative of the constitutional provision that the property of no person shall be taken or damaged for public use without just compensation. *Douglas County v. Papillion Drainage District*..... 771

2. The legislature may grant drainage districts the right to cross highways, and if it imposes no conditions the county authorities can impose none. *Douglas County v. Papillion Drainage District*..... 771

3. Sec. 23, art. IV, ch. 89, Comp. St. 1911, requiring drainage districts to restore public highways which they cross, does not relieve such districts from the duty imposed by common law and by sec. 110, art. I, ch. 78, Comp. St. 1911, to maintain crossings on all such highways. *Richardson County v. Drainage District* 773

4. Where a new channel has been made by a drainage district for a stream which has been bridged by the public, and the new bridge relieves the county from maintaining the old bridge, the new bridge should be maintained by the public, and not by the drainage district. *Richardson County v. Drainage District* 773

Drunkards.

Instruction *held* to be an erroneous definition of drunkenness and intoxication. *Freeburg v. State*..... 346

Easements.

One seeking to close a way over his land which has been used by his neighbor for more than 10 years has the burden of showing that the use was permissive, and not under a claim of right. *Majerus v. Barton*..... 685

Ejectment.

Where parties entitled to the possession of land execute to their attorneys a quitclaim deed to an undivided one-half of the land as security for their services, such deed is in effect a mortgage, and it is not necessary to join the grantees as plaintiffs in an action in ejectment. *Helming v. Forrester*.. 284

Elections. See CRIMINAL LAW, 25.

1. Under sec. 45, ch. 52, laws 1907, the 500 electors who must be present at a mass state convention to form a new political party need not be the identical 500 who sign the agreement to form such party. *Morrissey v. Wait*..... 271
2. Secs. 39, 40, ch. 52, laws 1907, providing for nomination of candidates by a convention or committee, apply to nominations by new parties for general elections, as well as to nominations by old parties in special elections and for offices excepted from the provisions of the act. *Morrissey v. Wait*.. 271
3. Where a new party is formed after the time for holding primary elections, nominations may be made by mass convention, under sec. 45, ch. 52, laws 1907, and certificates of nomination may be filed at the time specified in sec. 40. *Morrissey v. Wait*..... 271
4. Statutes relating to the exercise of the elective franchise and nomination of candidates, either at primaries or by conventions or committees, should be construed in the light of sec. 22, art. I of the constitution, guaranteeing that all elections shall be free. *Morrissey v. Wait*..... 271
5. Ch. 26, Comp. St. 1911, recognizes political parties, and delegates to each party the right to vote at primaries and general elections for their own candidates nominated without interference of members of any other political party. *State v. Wait* 313
6. The preferential vote of a political party at a primary for a candidate for president, while morally binding on delegates to the national convention, has no relation to candidates nominated for presidential electors. *State v. Wait*..... 313
7. Persons nominated at a primary for presidential electors are nominated, not to vote for any particular candidate then known, but for the candidate who may subsequently be nominated by the national convention of the party. *State v. Wait* 313
8. By secs. 125r, 140, ch. 26, Comp. St. 1911, every voter has the right, by a single cross, or by one manipulation of the lever of a voting machine, to vote a straight party ticket; and the governing body or committee of the party may appeal to the court to enforce such right. *State v. Wait*..... 313
9. The national convention of a political party, or its national central committee, is the supreme governing body as to national affairs, and has authority to decide which of rival conventions or committees in the state is the authorized convention or committee of the party. *State v. Wait*..... 313
10. The legislature of this state, in providing for the "closed

Elections—Concluded.

- primary," has adopted the policy of allowing each political party to select its own candidates. *State v. Wells*..... 337
11. Any one who has the statutory qualifications to fill an office may be a candidate for the office; and if he affiliates with a political party he may become its candidate, or he may become a candidate independently of all parties. *State v. Wells* 337
 12. Under the primary law, no political party can be compelled to present as its candidate at a general election one who does not affiliate with the party. *State v. Wells*..... 337
 13. If a political party at its primary makes no nomination for an office, a vacancy has occurred, and the proper party committee may fill the vacancy. *State v. Wells*..... 337

Embezzlement.

1. If an agent receives a draft from his principal with instructions to purchase certain property, and the agent obtains the money on the draft and converts it, the jury are justified in finding that he obtained it as agent. *Goldsberry v. State*. 211
2. Indictment under sec. 121 of the criminal code held to show that the principal whose agent was charged with embezzlement was a private person. *Goldsberry v. State*..... 211
3. Evidence held to sustain conviction of embezzlement. *Goldsberry v. State*..... 211

Eminent Domain. See DRAINS, 1, 2.

1. If one acquiesces in an appropriation of his land for a public use, he cannot regain possession by ejectment, but he may recover the value thereof. *Ensign v. Citizens Interurban R. Co.* 363
2. When the right of flowage of private lands has been acquired under the *ad quod damnum* act for a public purpose, if the use is changed to a different and private purpose, it is an abandonment of the right, but a change to another public use is not. *Lucas v. Ashland L., M. & P. Co.*..... 550
3. Owners of riparian lands injured by flowage, and not included in the original *ad quod damnum* proceedings, may proceed under sec. 14, ch. 44, Gen. St. 1873; but after the dam causing the overflow has been built and the mill in operation for many years, they cannot abate the dam as a nuisance, or restrain its use till their damages are adjusted. *Lucas v. Ashland L., M. & P. Co.*..... 550
4. In a suit by the owners of riparian lands to enjoin the use of a water power and remove a dam, the court should, if the injunction is refused, allow plaintiffs such damages as they are entitled to. *Lucas v. Ashland L., M. & P. Co.*..... 550

Eminent Domain—Concluded.

5. Riparian owners whose lands were not included in *ad quod damnum* proceedings should be allowed such damages as are caused by the dam; and those whose lands were included should be allowed such damages as were caused beyond those allowed in the original proceedings. *Lucas v. Ashland L., M. & P. Co.*..... 550
6. Whether an undertaking is a public utility is largely within the discretion of the legislature, and, unless it is clearly private, courts will not interfere with its discretion. *Lucas v. Ashland L., M. & P. Co.*..... 550
7. The use of water power to generate electricity to supply a city and its inhabitants with light and power is a public use. *Lucas v. Ashland L., M. & P. Co.*..... 550

Equity.

When equity has taken jurisdiction of a controversy, it will dispose of the whole matter. *Shevalier v. Stephenson*..... 675

Estoppel. See HUSBAND AND WIFE, 3. WATERS, 5, 14.

1. Mandamus brought by a private citizen under sec. 2, ch. 71, Comp. St. 1911, cannot estop the state in other litigation from taking a different position; the state being a nominal party. *State v. Ryan*..... 636
2. Where a grantee conveys land in the name by which he holds it of record, he will be estopped as against his grantee to allege that it is not his true name. *Butler v. Farmland Mortgage & Debuture Co.*..... 659

Evidence. See APPEAL AND ERROR, 12-25. BILLS AND NOTES, 2, 4-6. CRIMINAL LAW. DEPOSITIONS. HUSBAND AND WIFE, 4-9. INTOXICATING LIQUORS, 1, 3. STREET RAILWAYS, 2, 3. TAXATION, 8. TOWNS, 1. WILLS, 4. WITNESSES.

1. In an action between the original parties, it may be shown by parol that a note was delivered on condition that it should be payable only on a certain event. *Musser v. Musser*..... 387
2. Where a written order for advertising shows on its face that it does not contain the entire contract, oral warranties made by the agent and the use of a sample in procuring the order may be shown by parol. *National Engraving Co. v. Queen City Laundry* 402
3. Oral warranties by an agent that goods sold would be equal to samples may be shown by parol. *Providence Jewelry Co. v. Gray Mercantile Co.*..... 633
4. Secondary evidence is admissible only when primary evidence cannot be secured. *Deeder v. State*..... 662
5. Evidence of a separate oral agreement between parties to a

Evidence—Concluded.

- written contract, as to matters on which the contract is silent, is admissible. *Wehnes v. Roberts*..... 696
6. A superseded decree, pending appeal, is not admissible to prove a final adjudication determining the rights of the parties. *Fassler v. Streit*..... 786
7. Where a party whose rights are affected by a decree pleads that the decree is not final, and introduces evidence of an appeal therefrom, he cannot use the decree as evidence of a final adjudication determining the rights of the parties. *Fassler v. Streit*..... 786
8. While a court will take judicial notice of its own records, it will not in one case take judicial notice of the records in another case. *Fassler v. Streit*..... 786
9. A city ordinance may be proved by original records, though the charter provides other methods. *Van Valkenberg v. Rutherford* 803

Exceptions, Bill of. See APPEAL AND ERROR, 16, 17.

Execution.

- One not a party to proceedings in which judgment is entered may enjoin the levy of an execution on his property to collect the judgment. *Tierney v. Evans*..... 330

Executors and Administrators.

1. Where a coroner sold personal property to pay funeral expenses, he is entitled to set off the funeral expenses against the administrator's claim for the value of the property sold. *Lenderink v. Sawyer*..... 587
2. Where a coroner sold personal property to pay funeral expenses, he was at most an executor *de son tort*; and the administrator, being bound to pay the funeral expenses, cannot complain because the coroner paid them. *Lenderink v. Sawyer* 587

Fraud. See CONTRACTS, 1. SALES, 4.

- Petition held insufficient to entitle plaintiff to recover for false representation in sale of horse. *Sherrill v. Coad*..... 406

Fraudulent Conveyances.

1. Decree upholding a conveyance from a husband to his wife held proper. *Parsons v. Cathers*..... 525
2. If a husband and wife own two lots as tenants in common, and reside on one of them, which is of the full value of the homestead exemption, the husband's interest in the other is not exempt, and a transfer to his wife without consideration will be set aside as fraudulent. *Valparaiso State Bank v. Schwartz* 575

Garnishment.

One obtaining possession of merchandise purchased in bulk in violation of secs. 31, 32, ch. 32, Comp. St. 1911, is a trustee for the benefit of creditors of his vendor, and liable as garnishee. *Appel Mercantile Co. v. Barker*..... 669

Guaranty.

A guarantor is not liable on his contract, where the person for whose benefit it is made violates his own obligations and deprives the guarantor of the means of preventing the loss protected by the guaranty. *First Nat. Bank v. Wheatley*... 807

Highways. See DRAINS. INDICTMENT AND INFORMATION, 2.

1. If the driver of an automobile sees that a horse driven to a carriage is frightened, he should exercise ordinary prudence to avoid inflicting an injury. *Tyler v. Hoover*..... 221
2. The mere fact that a horse becomes frightened by an automobile on a highway does not render the operator thereof liable for resulting injury. *Tyler v. Hoover*..... 221
3. The law does not denounce the use of an automobile on a public highway, and appellant was not guilty of negligence because he used one on the streets of a city. *Tyler v. Hoover* 221
4. The driver of a horse and carriage has no rights in a highway superior to the rights of a driver of an automobile. *Tyler v. Hoover*..... 221
5. The restrictions which the law imposes on all modes of travel on highways are such as tend to secure to the general public the largest enjoyment thereof, all persons having an equal right to travel in safety; and, when accidents happen as incidents to reasonable use and reasonable care, the law affords no redress. *Tyler v. Hoover*..... 221
6. The road law of Nebraska does not require a county or municipality to guarantee the safety of its highways, but they must keep them in reasonably safe condition for public travel. *Beebe v. Scott's Bluff County*..... 501
7. Where a county allows an open ditch to remain in the center of a public road, it may be liable for an injury caused thereby. *Beebe v. Scott's Bluff County*..... 501
8. County held liable for injuries on highway. *Beebe v. Scott's Bluff County*..... 501

Homestead. See SPECIFIC PERFORMANCE, 3.

1. One whose mental faculties are so impaired that she cannot form a clear intention to abandon her homestead will not be held to have done so merely because she left it for a short time till placed in an asylum. *Whitford v. Kinzel*..... 373
2. All presumptions are in favor of the preservation of the

Homestead—Concluded.

- homestead, and the burden of proving abandonment is on the one attacking the homestead interest. *Whitford v. Kinzel* 373
3. Two adjoining tracts of land owned by husband and wife, respectively, and operated as a whole, held to constitute the family homestead; no rights of creditors being involved. *Whitford v. Kinzel*..... 373
 4. A wife is not, by virtue of the marriage relation alone, entitled to recover rents of a portion of the family homestead owned by the husband, either before or after an attempted conveyance by him. *Whitford v. Kinzel*..... 373
 5. Evidence held insufficient to establish the abandonment of a homestead. *Whitford v. Kinzel*..... 373
 6. The term "homestead" in the statute means the house and land where the family dwells. *Metsner v. Hill*..... 435
 7. The homestead is subject to execution sale on judgments against the holder of the title if its value exceeds \$2,000. *Meisner v. Hill*..... 435
 8. If the legal title to the homestead is in the husband, and there are no claims of creditors, on his death it vests in the widow for life, without regard to its value, and in the absence of a will his heirs take it subject to the widow's life estate. *Meisner v. Hill*..... 435
 9. Where the homestead is owned by husband and wife as tenants in common, and is of the value of the homestead exemption, neither can claim other real estate exempt. *Valparaiso State Bank v. Schwartz*..... 575

Homicide.

1. Evidence held not to sustain defense of insanity. *Prince v. State* 490
2. Evidence held to sustain a conviction of manslaughter. *Stehr v. State*..... 755
3. In a prosecution for homicide in negligently causing the death of a child, admission of evidence as to the existence of bruises, scars, and marks on its body held not error. *Stehr v. State*..... 755
4. One charged with the care and control of a child, who fails to obtain for it necessary medical aid, thereby causing its death, may be guilty of such criminal negligence as to render him guilty of manslaughter. *Stehr v. State*..... 755
5. Whether the negligence of one charged with the care of a child, which results in death, is such as to make him criminally liable is a question for the jury. *Stehr v. State*.. 755
6. For a parent having special charge of a child to so neglect

Homicide—Concluded.

it that death ensues constitutes manslaughter, though death or grievous bodily harm were not intended. *Stehr v. State*.. 755

Husband and Wife. See **BILLS AND NOTES**, 5, 6.

1. Sec. 1, ch. 53, Comp. St. 1911, has taken away the common-law power of a husband to dispose of his wife's property, and a married woman has the same power to dispose of her property that a married man has to dispose of his. *Marsh v. Marsh* 189
2. Contracts of a married woman must be with reference to her separate estate, and a contract to bind her separate estate binds only the property she has at the time, and the proceeds thereof; and if she assigns specific property the contract is "with reference to her separate estate." *Marsh v. Marsh* 189
3. Though the defense of coverture is based upon lack of power, when a contingent interest in property is so remote as to be incapable of assignment, an attempt to assign it and subsequent conduct, continued until after the assignor's title has become perfect, may create an estoppel to deny the validity of the assignment. *Marsh v. Marsh*..... 189
4. In an action for alienation of a wife's affections, she not being a party to the action, evidence of admissions made by her are incompetent. *Phelps v. Bergers*..... 851
5. In an action for alienation of a wife's affections, evidence that plaintiff mistreated his wife and was intimate with other women held competent as affecting the measure of damages. *Phelps v. Bergers*..... 851
6. Where, in an action for alienation of his wife's affections, plaintiff testified to injuries to his feelings and mental suffering, he may be cross-examined as to his having mistreated his wife, and his intimacy with other women. *Phelps v. Bergers*..... 851
7. Evidence that defendant assisted plaintiff's wife in procuring a divorce is competent as a circumstance tending to prove alienation of affections, but not proper to submit to the jury as an issue in itself. *Phelps v. Bergers*..... 851
8. Where a parent or rightful adviser counsels a wife relative to marital trouble, the question of good faith calls for an instruction on that issue. *Phelps v. Bergers*..... 851
9. Where a stranger interferes in the affairs of husband and wife, there is no presumption of good faith. *Phelps v. Bergers* 851

Indictment and Information. See **BURGLARY**, 1. **EMBEZZLEMENT**, 2.

1. An indictment must be indorsed and the indorsement sub-

Indictment and Information—Concluded.

scribed by the foreman of the grand jury, but the signature of the prosecuting attorney is unnecessary. *Goldsberry v. State* 211

2. An information charging that defendant permitted his son, under 16 years of age, to operate his automobile on the highway, and to drive past a team without giving warning, and to drive past the team at a high rate of speed and return to the road within less than 30 feet from the team, will not sustain conviction, where the evidence showed that the defendant himself was operating the automobile. *Coryell v. State* 482

Injunction. See EXECUTION. MANDAMUS. TAXATION, 12.

1. The district court, in a suit for specific performance of a contract to sell land, may enjoin the prosecution of an action of forcible entry and detainer pending on appeal from justice's court, and may enjoin enforcement of the judgment while the appeal is pending. *State v. Graves* 333
2. Equity may enjoin the bringing of successive suits for the same cause against the same parties, in the absence of evidence of good faith of plaintiff. *Shevalier v. Stephenson*... 675
3. If an action at law has proceeded to judgment, and one of the parties brings successive vexatious suits for a new trial, defendant need not establish her legal rights before obtaining on cross-petition an injunction restraining the recommencing of such suit. *Shevalier v. Stephenson*..... 675
4. Where a contract for school buildings was *ultra vires* when suit was begun to enjoin its performance, and before trial it was modified to bring it within the powers of the board, costs are taxable to defendant. *Gaddis v. School District*... 701
5. Equity will not enjoin an officer or party from taking depositions of the opposing party and his attorney, unless it clearly appears that the officer is acting without jurisdiction, or is exceeding his lawful authority. *Old Line Bankers Life Ins. Co. v. Witt*..... 743
6. A petition to restrain a notary from taking depositions which fails to state facts showing that the officer is exceeding his jurisdiction, or is requiring the production of evidence which is clearly privileged, is demurrable. *Old Line Bankers Life Ins. Co. v. Witt*..... 743

Insurance.

1. Ch. 33, Gen. St. 1873, regulating insurance companies, applies to all kinds of insurance except life insurance. *State v. Barton* 666

Insurance—Concluded.

2. All companies whose object is to transact insurance business in this state must obtain license as the statute provides.
State v. Barton..... 666

Intoxicating Liquors.

1. In a prosecution for the sale of whiskey in violation of ch. 50, Comp. St. 1911, evidence *held* to sustain a conviction.
Nixon v. State..... 115
2. In a prosecution for an illegal sale of spirituous and intoxicating liquor, an instruction that the law provides that all persons who sell any spirituous liquors or any intoxicating drinks without a license are guilty of a misdemeanor, *held* without error. *Nixon v. State*..... 115
3. In a prosecution for an illegal sale of liquor, *held* not error to receive in evidence the federal liquor license issued to defendant; the objection to its introduction being that it was obtained by stealth. *Nixon v. State*..... 115
4. In a prosecution for illegal sale of liquor, an instruction that the name is not material, if the character of the liquor is shown to be intoxicating, *held* proper. *Nixon v. State*..... 115
5. A saloon license purporting to be issued to a deceased person in the company name used by him in his lifetime is invalid. *Willow Springs Brewing Co. v. Newcomb*..... 682

Judgment. See EVIDENCE, 6, 7.

1. Evidence in suit to vacate judgment *held* to sustain finding and decree for plaintiff. *Cusick v. Brodsky*..... 281
2. Revivor of a dormant judgment has no other effect than to reinstate the judgment and authorize execution. *Tierney v. Evans* 330
3. One not a party to the original judgment who fails to appear upon service of the conditional order of revivor is not made a party to the judgment by the final order of revivor. *Tierney v. Evans*..... 330
4. In proceedings to revive a dormant judgment, a finding for defendant on conflicting evidence will not be disturbed. *Sandwich Mfg. Co. v. Huckfeldt*..... 350
5. A decree in equity is binding only on parties to the suit, but the matters determined cannot be litigated against a party on the ground that she is jointly liable with others who were dismissed before trial. *Shevalier v. Stephenson*.. 675
6. A cause determined on the merits cannot be litigated by a new proceeding before the same or any other tribunal.
Trainor v. Maverick Loan & Trust Co...... 821
7. A judgment on a demurrer to the merits is *res judicata*;

Judgment—Concluded.

but a judgment on a demurrer based on a technical defect of pleading, a lack of jurisdiction, or the like, is not.

Trainor v. Maverick Loan & Trust Co...... 821

Judicial Sales.

1. A purchaser at a referee's sale of land, over which a railroad company has an easement of a right of way, cannot impose terms or make a bargain with the referee not authorized by the court. *George v. Pracheil*..... 81
2. Where the court authorized the sale of a tract of land as a whole, held that the purchaser took such rights only as the referee could convey, which included the whole tract, subject to a right of way easement of a railroad company. *George v. Pracheil*..... 81
3. Though a bid at a referee's sale may be withdrawn at any time before acceptance, yet the assertion of a claim that a railroad company's right of way across the tract reduced the sum to be paid is not a withdrawal, and the purchaser is liable for the entire amount of his bid. *George v. Pracheil*.. 81
4. Ordinarily judicial sales will not be set aside for inadequacy of price, in the absence of fraud or mistake, when the purchaser pays two-thirds of the appraised value of defendant's interest in the land. *Frederick v. Gehling*..... 204

Justice of the Peace.

The continuance of a civil action by a justice for more than 90 days, without consent of the parties, is a final order, reviewable by proceedings in error in the district court. *Tongue v. Lloyd*

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Landlord and Tenant. See WATERS, 15, 16.

Licenses.

1. Under subd. 9, sec. 48, art. III, ch. 13, Comp. St. 1911, each city of the first class having more than 5,000 and less than 25,000 inhabitants may levy a tax on every occupation, except those enumerated in the proviso clause. *City of Grand Island v. Postal Telegraph Cable Co.*..... 253
2. A city of the first class having more than 5,000 and less than 25,000 inhabitants may enact an ordinance imposing a reasonable license tax on telegraph companies. *City of Grand Island v. Postal Telegraph Cable Co.*..... 253
3. An ordinance imposing a tax equal in amount on all telegraph companies is not violative of secs. 1, 6, art. IX of the constitution, requiring uniformity and equality. *City of Grand Island v. Postal Telegraph Cable Co.*..... 253
4. An occupation tax is not to be measured by profits of the

Licenses—Concluded.

business taxed, but it is an incident to local self-government; and courts will not declare it void, unless clearly shown to be unreasonable or confiscatory. *City of Grand Island v. Postal Telegraph Cable Co.*..... 253

Liens.

Two parties having liens on land of sufficient value to pay all liens should act in entire good faith to realize sufficient to satisfy both liens. *Frederick v. Gehling*..... 204

Limitation of Actions. See WATERS, 12.

1. Service of summons in ejectment arrests the running of limitations in favor of a defendant who claims by adverse possession, though the form of action is subsequently changed to a suit to redeem. *Butler v. Secrist*..... 506
2. Limitations do not run against an amended pleading setting forth a more complete statement of the original cause of action. *Witt v. Old Line Bankers Life Ins. Co.*..... 763

Mandamus. See ESTOPPEL, 1.

The supreme court has jurisdiction by mandamus to compel a judge of the district court to vacate an order of injunction, if the district court was without jurisdiction to make the order. *State v. Graves*..... 333

Master and Servant.

1. Whether an employee is a fellow-servant or the representative of the master is determined by whether he is charged with the performance of a duty which properly belongs to the master. *Mitchell v. Omaha Packing Co.*..... 496
2. Where a master directs an employee to perform a duty personal to himself, he is liable for the employee's neglect. *Mitchell v. Omaha Packing Co.*..... 496
3. Telephone company held not negligent in placing a distributing pole near the wires of a light company. *Wilkins v. Water & Light Co.*..... 513
4. The doctrine of assumption of risks arises from the relation of master and servant, and does not constitute a defense where that relation does not exist. *Wilkins v. Water & Light Co.*..... 513
5. Where a machine is unsafe because not properly guarded, and an employee, with full knowledge of its condition, takes charge thereof without objecting, he assumes the risk of injury. *Bradford v. Bee Building Co.*..... 571
6. A servant assumes only such risks as are necessarily and usually incident to the employment. *Tully v. Grand Island Telephone Co.*..... 719

Master and Servant—Concluded.

- 7. Where an employer has knowledge that the particular employment is hazardous from extraneous causes beyond what it fairly imports or is understood by the employee to be, the master is bound to inform the employee, and, if he fails to do so, he is liable for resulting injury. *Tully v. Grand Island Telephone Co.*..... 719

Mortgages. See APPEAL AND ERROR, 4. PRINCIPAL AND AGENT, 7, 9.

- 1. Notes and mortgage held obtained by undue influence and without consideration. *Holladay v. Rich*..... 91
- 2. By personal service of summons on a mortgagor who is owner of the equity of redemption, the court obtains jurisdiction; and a mistake in the name of defendant, not brought to the court's attention by motion or plea in abatement, does not deprive the court of jurisdiction, nor render the decree subject to collateral attack. *Page v. Bresee*..... 241
- 3. Where a mortgagee, without an agreement therefor, takes possession before confirmation of a judicial sale, he becomes liable to the mortgagor or his grantees for the rents and profits. *Attwood v. Warner*..... 370
- 4. A conveyance by a mortgagor to a *bona fide* purchaser vests the purchaser with the right to the rents and profits, which he may have applied on the mortgage debt. *Attwood v. Warner* 370
- 5. Where one takes title to real estate by his initial letters as his first name, subject to a mortgage, the mortgage may be foreclosed and notice given him by publication by such name. *Lear v. Fickweiler*..... 621

Municipal Corporations. See HIGHWAYS. OFFICERS, 4, 5. TAXATION, 7-10. TOWNS.

- 1. A judgment in proceedings under sec. 8978, Ann. St. 1907, to detach territory from a village will not be reversed, in the absence of a showing of mistake of fact or law. *Marsh v. Village of Trenton*..... 63
- 2. Evidence held to sustain a judgment detaching territory from a village. *Marsh v. Village of Trenton*..... 63
- 3. Power conferred on cities by subd. 4, sec. 48, art. III, ch. 13, Comp. St. 1903, to sell the fee of vacated streets may be exercised by the mayor and council without a vote of the people. *Van Valkenberg v. Rutherford*..... 803
- 4. Where a municipal charter confers on a city power to perform a particular administrative act, without specifying how it shall be exercised, the mayor and council may proceed by resolution. *Van Valkenberg v. Rutherford*..... 803
- 5. Where part of a street is vacated, only property owners

Municipal Corporations—Concluded.

whose property abuts on the vacated part are entitled to damages. *Van Valkenberg v. Rutherford*..... 803

Names. See ESTOPPEL, 2. MORTGAGES, 5.

Negligence. See MASTER AND SERVANT, 2-4. STREET RAILWAYS, 2, 3.

1. A snow storm of such violence as to prevent the moving of trains is an act of God. *Ward v. Chicago, St. P., M. & O. R. Co.*..... 183
2. In an action for damages on account of negligence, the negligence must be established by direct proof, or by showing facts and circumstances from which negligence may reasonably be inferred. *Ward v. Chicago, St. P., M. & O. R. Co.*... 183
3. Whether an employee of a telephone company was negligent in ascending a telephone pole in proximity to an uninsulated electric light wire held a question for the jury. *Wilkins v. Water & Light Co.*..... 513
4. Where the manager of an electric light company is informed that an uninsulated guard wire in proximity to a telephone distributing pole has become charged with a heavy current of electricity, a delay of over 36 hours in remedying the defect may constitute gross negligence. *Wilkins v. Water & Light Co.*..... 513
5. One who constructs a wall so that if it falls it will injure adjoining premises is bound to so construct it that it will withstand any gales reasonably to be expected. *Schroeder v. Lodge No. 188, I. O. O. F.*..... 650

New Trial. See APPEAL AND ERROR, 11.

1. Prior to repeal of sec. 315 of the code, a new trial would not be granted in an action for personal injuries for smallness of damages. *Norton v. Lincoln Traction Co.*..... 649
2. A motion for new trial cannot be amended by assigning new grounds after the time for filing such motion has expired, unless the party was unavoidably prevented from presenting the matter within the time. *Davis v. Taylor & Son*..... 769

Novation.

To constitute a novation, there must be an enforceable contract between the new debtor and the creditor, and the creditor must unconditionally release the original debtor. *Goetz Brewing Co. v. Wain*..... 614

Officers.

1. At common law, if a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office. *State v. Wait*..... 313
2. Where the incumbent of an office accepts another office, one

Officers—Concluded.

- test of incompatibility between them is whether the nature and duties of the two offices are such as to render it against public policy for the incumbent to retain both. *State v. Wait* 313
3. Where acts or events have rendered an office vacant, the authority having power to fill the vacancy may elect or appoint another to fill it. *State v. Wait*..... 313
4. Evidence held to show members of board of fire and police commissioners of South Omaha guilty of wilful neglect of duty. *State v. Ryan*..... 636
5. In *quo warranto* to oust members of fire and police board for wilful neglect of duty, evidence held to sustain findings of referee against respondents. *State v. Ryan*..... 636
6. An appointee to the office of secretary of the state banking board held to be a *de facto* officer. *Patterson v. State*..... 729
7. Where a *de facto* officer discharged the duties of a state office, was recognized as entitled to the office, and was paid the salary, a claimant cannot, after the term, recover the salary from the state, though he was deprived of the office by an injunction wrongfully issued. *Patterson v. State*.... 729
8. Where an appointee to office filed his bond, but later withdrew it, and discharged none of the duties of the office, he is not entitled to the salary, another having discharged the official duties under a claim of right and having received the salary. *Patterson v. State*..... 729

Parent and Child. See HOMICIDE, 4-6.

If a parent has not the means for the child's nurture, it is his duty to apply to the public authorities for relief, and failure to do so is itself culpable neglect. *Stehr v. State*..... 755

Partnership. See ABATEMENT. BROKERS. STATUTE OF FRAUDS.

The fact that a partnership, as a separate entity, is not served with summons in a suit does not affect the validity of the decree as to the equitable interests of the partners who were served. *Dincen v. Lanning*..... 545

Pleading. See APPEAL AND ERROR, 1, 2, 5. BILLS AND NOTES, 5. COMPROMISE AND SETTLEMENT. FRAUD. INJUNCTION, 6. PRINCIPAL AND SURETY, 1.

1. Permitting amendment of answer after trial has begun is within the discretion of the court, and unless abuse thereof is shown the action of the court will be upheld. *Kinney v. Chicago, B. & Q. R. Co.*..... 383
2. An answer which admits that a railroad company "is now operating" the railroad, and does not deny that it was the

Pleading—Concluded.

- owner at the time of an accident, does not raise the issue of ownership or operation at that time. *Kinney v. Chicago, B. & Q. R. Co.*..... 383
3. Where the original answer pleaded fraud in obtaining a note and that it was given upon a condition, and the court permitted an amended answer pleading the condition only, *held* no abuse of discretion. *Musser v. Musser*..... 387
4. Where a petition in an action for personal injuries sets out the facts, it is unnecessary to plead the conclusion to be drawn therefrom. *Schmidt v. Village of Papillion*..... 511
5. If a cause of action is stated, redundant matter will not render the petition demurrable as not stating a cause of action. *Union Stock Yards Nat. Bank v. Lamb*..... 608
6. In an action for death from contact with an electric wire, petition *held* sufficient after judgment. *Tully v. Grand Island Telephone Co.*..... 719
7. Where a demurrer to a petition is sustained, and the plaintiff makes no request to amend, but takes time to prepare a bill of exceptions, and procures an order for a supersedeas bond, he waives his right of amendment, and the court may dismiss his action. *Old Line Bankers Life Ins. Co. v. Witt*.. 743

Principal and Agent.

1. A principal must disaffirm the unauthorized act of his agent within a reasonable time after such act comes to his knowledge. *Singer Sewing Machine Co. v. Barger*..... 539
2. Where a note given for remainder due on a sewing machine provided that the machine was to remain the property of the seller until payment of the price, and the holder, with notice that it has been altered, brings replevin upon the altered note, he thereby ratifies the act of alteration. *Singer Sewing Machine Co. v. Barger*..... 539
3. Where a note was altered by the agent of the holder, plaintiff bringing replevin upon the altered note cannot recover. *Singer Sewing Machine Co. v. Barger*..... 539
4. Authority to act as agent may be inferred if the party charged as principal causes third persons to trust and act upon an apparent agency. *Triller v. Sadle*..... 579
5. Where the name of the principal was signed to a lease by a firm as agents, who took a bill of sale and replevied hay growing on the land leased in the name of their principal, he will be bound by what they did. *Triller v. Sadle*..... 579
6. One assuming to act as agent for the estate of a deceased person in purchasing liquors without authority from the

Principal and Agent—Concluded.

- probate court and without a license is personally liable for the price of the liquors. *Willow Springs Brewing Co. v. Newcomb* 682
7. Where one has placed his agent for investments in notes and mortgages in such a situation that persons would be justified in regarding the agent as having full authority to make collections, payment to the agent will be deemed payment to the principal. *Walker v. Hale*..... 829
Walker v. Rudd..... 839
8. Whether an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances of the transaction. *Walker v. Hale*..... 829
9. In a suit to foreclose a mortgage, evidence held to sustain a finding that plaintiff's agent had authority to collect the debt and satisfy the mortgage. *Walker v. Hale*..... 829
Walker v. Rudd..... 839
10. That one to whom money due another is paid is not in possession of the evidences of indebtedness is not conclusive that he had no authority to receive payment, but is only a fact to be considered in the determination of such question. *Walker v. Rudd*..... 839
11. That the payor of a note pays it without demanding a cancellation is not conclusive evidence of negligence, negligence being a question of fact to be determined from all the circumstances. *Walker v. Rudd*..... 839
12. Evidence held to show that a mortgagee who assigned the mortgage was the agent of his assignee, and that payment to him satisfied the mortgage. *Walker v. Smith*..... 841
Walker v. Stewart..... 845

Principal and Surety.

1. In an action by the surety to recover from a county judge expenses incurred in defense of a action on his bond, petition held not to state a cause of action. *American Surety Co. v. Vinsonhaler*..... 1
2. Under a contract of suretyship, the surety is entitled to be protected against all necessary expenses incurred in defending itself against liability on the bond. *American Surety Co. v. Vinsonhaler*..... 1
3. The surety on the official bond of a county judge held not entitled to recover unnecessary expenses incurred in defense of an action on the bond, where the surety had no reason to regard the expenses as necessary. *American Surety Co. v. Vinsonhaler* 1

Quieting Title.

1. In a suit to quiet title, evidence held to require a decree in favor of appellant. *Holladay v. Rich*..... 91
2. Pleadings and proof held to sustain a decree for plaintiff. *Peterson v. Lincoln County*..... 167

Quo Warranto. See OFFICERS, 5.

Rape.

1. In a prosecution for rape of a female child under 15 years of age, it is not a defense that others have abused her. *Kanert v. State*..... 14
2. Where the birth of a child is relied on as evidence, and complainant has denied intercourse with any other than accused, she may be cross-examined as to circumstances tending to show that another is father of the child. *Kanert v. State* 14
3. A conviction for rape cannot be sustained upon the uncorroborated testimony of the complainant. *Kanert v. State*.. 14
4. The testimony of the complainant as to the commission of rape may be corroborated by evidence of circumstances showing a disposition to commit the crime and an opportunity to do so. *Kanert v. State*..... 14
5. Where the commission of rape is established beyond question, and there are inconsistencies in the evidence of accused from which it may reasonably be inferred that the testimony of the complaining witness implicating accused is substantially correct, it presents a case for the jury. *Kanert v. State* 14
6. In a prosecution for rape, where the prosecution has elected to proceed on one of several distinct offenses, a certain instruction as to corroborative evidence held properly refused. *Kanert v. State*..... 14
7. A sentence of seven years' imprisonment in the penitentiary for rape held within the reasonable discretion of the trial court. *Kanert v. State*..... 14
8. That a female child 17 years of age was pregnant and died from the effects of an abortion is sufficient evidence that some one had sexual intercourse with her at an age prohibited by statute. *Thrasher v. State*..... 110
9. Evidence in prosecution for rape, though largely circumstantial, held sufficient to be submitted to the jury. *Thrasher v. State* 110
10. On a trial for statutory rape, where the female child died from the effects of a criminal abortion, evidence by the physician who attended her at the time of the miscarriage, as to what they discovered upon an examination, is not prohibited by law. *Thrasher v. State*..... 110

Replevin. See **PRINCIPAL AND AGENT, 3.**

1. In replevin, where the property is delivered to plaintiff under a bond, and the judgment is for a return of the property to defendant, plaintiff must return it within a reasonable time in substantially the same condition as when taken. *Wallace v. Cox* 354
2. Where judgment in replevin is for defendant, and the replevied property is not redelivered within a reasonable time, and, when tendered, is greatly diminished in value, defendant may refuse to accept it, and may sue on the replevin bond. *Wallace v. Cox*..... 354
3. The measure of damages for failure to return replevied property to defendant is its value as found in the replevin action, with interest and costs. *Wallace v. Cox*..... 354

Sales.

1. An order for goods, sent to a wholesale house, which provides in express terms that it is subject to the approval of the home office, does not become a binding contract until approved. *Crowder v. Tolerton & Warfield Co.*..... 250
2. Where the person making an order for goods, on being notified of its nonacceptance, demands and receives repayment of the money forwarded therewith, he rescinds his order, and cannot maintain an action for damages for its nonacceptance. *Crowder v. Tolerton & Warfield Co.*..... 250
3. To entitle a vendee to a rescission, he must allege and prove notice of his election to rescind, and a return or an offer to return the property. *Sherrill v. Coad*..... 406
4. The measure of damages for breach of warranty or fraudulent representations by a vendor of personalty is the difference between its actual value and what would have been its value had it been as represented. *Sherrill v. Coad*..... 406
5. A sale of personalty with a warranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent, and on breach of the warranty the property may be restored and the sale rescinded. *Sherrill v. Coad*..... 406
6. In an action for goods sold, where the purchase and receipt are denied, the burden is on plaintiff to prove the sale to the defendant. *Hirsch Distilling Co. v. Roach*..... 624
7. Whether liquors were sold to defendant or another held, under the evidence, a question for the jury. *Hirsch Distilling Co. v. Roach*..... 624
8. Where defendant denied purchasing goods, the fact that plaintiff had filed a claim for the goods against the estate of the person ordering them is a circumstance tending to

Sales—Concluded.

- show that the goods were sold to decedent. *Hirsch Distilling Co. v. Roach*..... 624
9. A purchaser by sample may refuse goods which do not correspond with the sample. *Providence Jewelry Co. v. Gray Mercantile Co.*..... 633
- National Engraving Co. v. Queen City Laundry*..... 402

Schools and School Districts. See INJUNCTION, 4.

1. Under ch. 79, Comp. St. 1911, school districts in cities having more than 1,500 inhabitants are governed by boards of education representative in form, while those in the country and in smaller cities and villages are democratic in form. *Gaddis v. School District*..... 701
2. The ultimate control of a rural school district resides in the electors, and is exercised at school meetings; and their directions as to school buildings and sites must be carried out strictly within the limits of the powers conferred at such school meetings. *Gaddis v. School District*..... 701
3. A board of education of a city school district has as full authority to select school sites and erect school buildings as the electors in a rural district. *Gaddis v. School District*.. 701
4. Since the repeal of the proviso to sec. 23, subd. XIV, ch. 79, Comp. St. 1891, the question of the selection of school sites or the erection of school buildings need not be submitted to the electors of a city school district. *Gaddis v. School District* 701
5. Except as limited by the statutes restricting the amount of taxes, and regulating the borrowing of money, a board of education has full power as to school sites and buildings. *Gaddis v. School District*..... 701
6. A board of education may add money derived from taxation to money obtained from bonds for building purposes, in order to pay for the erection of school buildings. *Gaddis v. School District* 701
7. Under sec. 23, subd. XIV, ch. 79, Comp. St. 1911, the board of education estimates the amount of money necessary for all purposes and the tax is levied in gross; and the amount levied is equally subject to anticipatory use for all purposes named in the estimate. *Gaddis v. School District*..... 701
8. Where money required by a contract for school buildings did not exceed the amount on hand derived from the sale of bonds and a tax levy for the current year, the contract was not *ultra vires* because all the money was not in the treasury when the contract was made. *Gaddis v. School District*.... 701

Specific Performance.

1. If one, with knowledge of the facts on which he relies for a rescission of his contract to convey land for a right of way to a street railway company, acquiesces in the construction of the improvement, equity may require him to specifically perform his contract. *Ensign v. Citizens Interurban R. Co.* 363
2. A parol contract will be enforced, where wholly performed by one party, and its nonfulfillment would amount to a fraud upon him. *Moline v. Carlson*..... 419
3. Where a husband and wife took a child, and orally agreed that, if he would remain with them during their lives and render them service, they would leave him their estates, the statute as to homesteads cannot be pleaded by the heirs as a defense to a suit to enforce the contract. *Moline v. Carlson* 419

States.

The state pays a salary but once, if paid through the regular channels provided by law, and the appropriation therefor is exhausted. *Patterson v. State*..... 729

Statute of Frauds.

- An agreement of settlement between a partner and the representatives of a deceased partner of partnership real estate is not within the statute of frauds (Comp. St. 1911, ch. 32, sec. 3), and may be oral. *Majors v. Majors*..... 473

Statutes. See AGRICULTURE. BILLS AND NOTES, 7. CONSTITUTIONAL LAW. CRIMINAL LAW, 22.

1. Ch. 49, laws 1907, providing for succession to estates of decedents, held not to violate sec. 11, art. III of the constitution, as to subject or title. *Gaster v. Estate of Gaster*..... 6
2. Where a statute is clear and unambiguous, it must be interpreted in its ordinary sense; but, if doubtful or obscure, an interpretation which will avoid a forfeiture or an injustice will be adopted. *Owen v. Main*..... 259
3. The title of ch. 44, Gen. St. 1873 (Comp. St. 1911, ch. 57), "An act relating to mills and milldams," is sufficiently broad to admit of legislation in regard to mills of all kinds that are of public utility and have machinery to be propelled by water. *Lucas v. Ashland L., M. & P. Co.*..... 550
4. Where amendments have been made to a bill after its first or second reading in either house, it need not be again read at large on three different days in each house to comply with sec. 11, art. III of the constitution. *State v. Ryan*..... 636
5. Where a bill has been introduced within the time limited by the constitution, amendments within its general purpose may be made thereafter. *State v. Ryan*..... 636

Statutes—Concluded.

6. The legislature may amend a statute by appending a proviso to a section thereof, if the subject of the proviso is within the title to the original act and germane to its provisions. *State v. Hevelone*..... 748
7. An act properly amended should be construed as though originally enacted in its amended form. *State v. Hevelone*... 748
8. An act complete in itself is not inimical to sec. 11, art. III of the constitution. *State v. Hevelone*..... 748
9. Where an act complete in itself is repugnant to a prior act, which is not referred to, the prior act is repealed by implication. *State v. Hevelone*..... 748

Street Railways.

1. Neither the operator of a street car nor the occupant of a private conveyance has a superior right at a street intersection, but both must act in a reasonable and careful manner to avoid injury. *Pierce v. Lincoln Traction Co.*... 797
2. Evidence of the running of a street car at an excessive speed, or of failure to give warning, is evidence of negligence. *Pierce v. Lincoln Traction Co.*..... 797
3. Evidence that a street car ran more than 150 feet after a collision before it could be stopped, though the brake had been firmly applied, is evidence of excessive speed. *Pierce v. Lincoln Traction Co.*..... 797

Subrogation.

1. The right of subrogation depends upon the facts and equities of the particular case in which it is asserted. *Frederick v. Gehling* 204
2. A mortgagee whose mortgage was on record before an execution sale, and was given to secure a loan with which mortgages prior to the judgment were paid, upon an understading with the mortgagor that it should be a first lien, is entitled to subrogation to the lien of the prior mortgages. *Frederick v. Gehling* 204

Taxation. See LICENSES.

1. In a tax lien foreclosure by a county without a prior administrative sale, where service was had by publication, the purchaser buys subject to the right of one having a lien on the premises to redeem. *Smith v. Potter*..... 39
2. Proof of publication of notice for constructive service held to show that the notice was published for the time required by statute. *Smith v. Potter*..... 39
3. In a suit to foreclose a tax lien against unknown heirs, a substantial compliance with sec. 83 of the code, an order of

Taxation—Concluded.

- court for services by publication and a legal publication of summons confer jurisdiction. *Page v. Bresee*..... 241
4. In a suit by a county against unknown heirs to foreclose a tax lien, the affidavit for service by publication provided by sec. 83 of the code may be made by the county attorney. *Page v. Bresee*..... 241
 5. Where the court has obtained jurisdiction, mere informalities of procedure will not subject the decree of foreclosure of tax lien to collateral attack. *Page v. Bresee*..... 241
 6. Before bringing suit to redeem from tax sale, all taxes subsequent to the sale must be paid; and where paid by the purchaser the amount should be included in the decree allowing redemption. *Lazure v. Maverick Loan & Trust Co.*..... 471
 7. The electors at a town meeting have power, within statutory limitations, to determine the tax required for township purposes, and their action is the foundation for the levy by the county board. *Union P. R. Co. v. McLean*..... 813
 8. In a suit to enjoin the collection of township taxes levied by authorized officers within statutory limitations, the burden of proving that the taxes are illegal is on plaintiff. *Union P. R. Co. v. McLean*..... 813
 9. Failure of the town clerk to enumerate in his certificate to the county clerk the several purposes for which the taxes are needed, or to state the amount required for each purpose, does not invalidate a levy made by the proper officers within statutory limitation. *Union P. R. Co. v. McLean*..... 813
 10. That a town clerk certified to the county clerk the number of mills required for township taxes as the basis of a levy, instead of the specific sums for the different purposes, does not invalidate the taxes, where they are levied by authorized officers within statutory limitations. *Union P. R. Co. v. McLean* 813
 11. One who takes cattle to feed for a nonresident of the county has control of them for the owner, within sec. 10927, Ann. St. 1911, and must list them for taxation. *Allen v. Dawson County* 862
 12. Where live stock is assessed in the name of one in control of it on the 1st day of April, and he afterwards purchases it, but before actually assessed, he cannot enjoin collection of the tax on the ground that he was not the owner on the 1st day of April. *Allen v. Dawson County*..... 862

Towns. See TAXATION, 7-10.

1. It is the duty of a town clerk to keep minutes of township proceedings and to enter therein at length every order, direction, rule, and regulation of the town meeting, and the

Towns—Concluded.

- record is the primary evidence of the business transacted. *Union P. R. Co. v. McLean*..... 813
2. Proceedings of the town meeting and the acts of the town officers should be liberally construed with a view to upholding the transaction of essential public business. *Union P. R. Co. v. McLean*..... 813

Trial. See APPEAL AND ERROR. BILLS AND NOTES, 3. CRIMINAL LAW. DAMAGES, 1. INTOXICATING LIQUORS, 2, 4.

1. Where a law action is tried by the court, findings of fact have the same force as a verdict. *National Engraving Co. v. Queen City Laundry*..... 402
2. Consolidation of suits to redeem from a mortgage held within the discretion of the trial court. *Butler v. Secrist*.. 506
3. If a litigant desires special findings of fact, he should request their submission. *Union Stock Yards Nat. Bank v. Lamb* 608
4. Permitting the jury to take the pleadings with them to the jury room is not ground for reversal, where not prejudicial to complainant. *Schroeder v. Lodge No. 188, I. O. O. F.*.... 650
5. In ejectment, where the undisputed evidence clearly establishes the right of possession in one of the parties, it is not error to direct a verdict. *Helming v. Forrester*..... 284
6. Judgment will not be reversed for an instruction not based on the evidence, where a proper instruction on the point in issue has been given. *Kinney v. Chicago, B. & Q. R. Co.*.... 383
7. In an action for tuition, instruction as to measure of damages held erroneous in view of the evidence. *International Text-Book Co. v. Martin*..... 430
8. To predicate error on the failure of the court to instruct on a particular feature of a case, complainant must request an appropriate instruction thereon. *Schroeder v. Lodge No. 188, I. O. O. F.*..... 650
9. The frequent repetition of a proposition in the instructions held not error, where complainant was not prejudiced thereby. *Schroeder v. Lodge No. 188, I. O. O. F.*..... 650
10. In an action on a written contract, where defendant denies plaintiff's allegation that he has performed, in the absence of proof of the allegation, it is proper to direct a verdict for defendant. *Witt v. Old Line Bankers Life Ins. Co.*..... 763

Vendor and Purchaser. See ESTOPPEL, 2.

- A purchaser of land near a projected line of street railway and boulevard is not charged with notice that by a change of the projected route a part of his land may be taken for such improvement. *Ensign v. Citizens Interurban R. Co.*..... 363

Waters.

1. The legislature may delegate the duty of formulating rules of procedure before the state board of irrigation, and the fact that the method of procedure is not embodied in the statute does not render due process of law lacking in the proceedings of the board. *Enterprise Irrigation District v. Tri-State Land Co.*..... 121
2. In determining priorities of appropriations under the irrigation act of 1895, the transcripts of posted and recorded notices transmitted by the county clerk to the state board of irrigation constitute the "claims" for adjudication. *Enterprise Irrigation District v. Tri-State Land Co.*..... 121
3. Evidence held to show that the right of a claimant to an appropriation of water as successor of the original appropriators was not lost by lack of diligence, nonuser, or abandonment. *Enterprise Irrigation District v. Tri-State Land Co.* 121
4. The posting and recording of notices of "claims" to the waters of the state, under ch. 68, laws 1889, held to be a public record, of which all parties interested were bound to take notice. *Enterprise Irrigation District v. Tri-State Land Co.*..... 121
5. Where plaintiffs stood by for four years with full notice of the claims of defendants to an appropriation of water for irrigation, and permitted defendants to expend nearly \$2,000,000 without notice of their claims to a prior appropriation, they are estopped to restrain the diversion of the water. *Enterprise Irrigation District v. Tri-State Land Co.* 121
6. Before the 1911 amendment to sec. 18, ch. 69, laws 1895, and under the irrigation act of 1889 (laws 1889, ch. 68), one who has constructed a canal, and is ready and willing to furnish water, has made the only application to a beneficial use that he can make, and his right continues until all lands for which water was originally appropriated use it, provided, formerly, that the water be applied within a reasonable time, and, now, within the time limited by statute. *Enterprise Irrigation District v. Tri-State Land Co.*..... 121
7. The irrigation act of 1895, creating the state board of irrigation and conferring on it the right to determine priorities, held constitutional. *Enterprise Irrigation District v. Tri-State Land Co.*..... 121
8. The limitation of 30 days within which to issue a certificate by the board of irrigation, under sec. 21, laws 1895, is merely directory; such certificate not being an adjudication, but merely evidence thereof. *Enterprise Irrigation District v. Tri-State Land Co.*..... 121

Waters—Concluded.

9. In determining priorities under secs. 15-27, laws 1895, the board of irrigation, though it might recognize and determine existing conditions and limitations, is without power to impose new. *Enterprise Irrigation District v. Tri-State Land Co.* 121
10. It is the duty of one who maintains a ditch to lower the waters of a lake to a river to maintain a dam at the outlet of the ditch sufficient to prevent flood-waters of the river from overflowing adjacent lands. *Christensen v. Omaha Ice & Cold Storage Co.*..... 245
11. Where a dam at the outlet of a ditch is negligently constructed, and farm lands are overflowed and crops and personal property destroyed, the person or corporation having control of the ditch and dam is liable. *Christensen v. Omaha Ice & Cold Storage Co.*..... 245
12. A cause of action for damages by overflow through negligent construction of a dam arises when the damages are sustained. *Christensen v. Omaha Ice & Cold Storage Co.*.... 245
13. That a ditch and dam are situated on land not owned by defendant is no defense to an action for damages by overflow, where defendant operates the dam for his private business. *Christensen v. Omaha Ice & Cold Storage Co.*.... 245
14. In an action by a tenant against an irrigation company for damages for refusal to furnish water, defendant held estopped under the facts to defend on the ground that plaintiff's landlord had not authorized him to use the water right. *Chalupa v. Tri-State Land Co.*..... 477
15. Where rent is payable in kind, the landlord and tenant are owners in common of the crops, and may maintain a joint action for damages thereto. *Chalupa v. Tri-State Land Co.*... 477
16. In an action by a tenant against an irrigation company for failure to furnish water, held not a defense that the tenant's lease was voidable. *Chalupa v. Tri-State Land Co.*..... 477

Wills.

1. A husband cannot lawfully dispose of his property by will, so as to deprive his wife of all interest therein given by ch. 49, laws 1907. *Gaster v. Estate of Gaster*..... 6
2. If a married man disposes of all his property by will, leaving nothing to his wife, she is entitled to the distributive share given her by statute. *Gaster v. Estate of Gaster*..... 6
3. A will will be construed so as to carry out the intent of the testator, unless contrary to state law or public policy. *Heywood v. Heywood*..... 72
4. Extrinsic evidence is admissible to ascertain whether a state

Wills—Concluded.

- of facts existed at the time a will was written which corresponded with the words used and the aim of the testator, but not to vary the terms of the will or to add to it. *Heywood v. Heywood*..... 72
5. Evidence held to show that a certain 80 acre tract of land was intended to be included in a devise. *Heywood v. Heywood* 72
- 6 When there are unambiguous expressions in a will, other expressions must be so construed, if reasonably practicable, as to harmonize with them. *Marsh v. Marsh*..... 189
7. The words "legal representatives" are frequently used in wills to mean the persons who succeed beneficially to the property of deceased; and whether they are so used, or the executor or administrator is intended, must be determined from all the provisions of the will. *Marsh v. Marsh*..... 189
8. The use of the expression, "heirs and legal representatives," instead of "heirs, executors, and administrators," may raise the presumption that those beneficially interested in the property of the decedent are intended. *Marsh v. Marsh*.... 189
9. To establish an oral agreement to make a testamentary disposition of property and to set aside a will, the evidence must be clear and convincing. *Labs v. Labs*..... 378

Witnesses. See CRIMINAL LAW, 12-14, 24. RAPE, 2.

1. A witness who sees a moving car, and possesses knowledge of time and distance, is competent to express an opinion as to the rate of speed of the car. *Pierce v. Lincoln Traction Co.* 797
2. That an agent of a party to an action is deceased at the time of trial does not render the other party incompetent to prove a transaction with the agent. *Walker v. Hale*..... 829

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